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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1936.

No. 89

ERNEST O. THOMPSON, C. V. TERRELL AND LON A. SMITH, COMPOSING THE RAILROAD COMMISSION OF TEXAS, ET AL.,

Appellants,

vs.

CONSOLIDATED GAS UTILITIES CORPORATION

AND

TEXOMA NATURAL GAS COMPANY,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

BRIEF FOR APPELLEES.

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IN THE

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OCTOBER TERM, A. D. 1936.

No. 89

ERNEST O. THOMPSON, C. V. TERRELL AND LON A. SMITH, COMPOSING THE RAILROAD COMMISSION OF TEXAS, ET AL.,

Appellants,

vs.

CONSOLIDATED GAS UTILITIES CORPORATION

AND

TEXOMA NATURAL GAS COMPANY,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

BRIEF FOR APPELLEES.

JURISDICTION.

Appellees properly invoked the jurisdiction of the court below, which entered decrees for the relief sought by appellees. Appellate jurisdiction of this Court is, of course, properly invoked by appellants.

QUESTIONS PRESENTED.

We do not concur in appellant's statement of the questions presented by this record. They assume that appellees and other pipe line companies producing gas for light

and fuel purposes have been guilty of disproportionate and excessive withdrawals of gas from the common reservoir in which their properties are located, that they have violated correlative rights of the owners of other gas properties in the same reservoir, and that the statute and regulations of which appellees complain are designed to prevent some wrongdoing by appellees and others similarly situated. We have caused no waste; and we have violated the legal rights of no other owner.

The principal issues presented by this record are:

(a) Whether or not the Railroad Commission of Texas, an administrative body, in pursuance of the statutes authorizing it to regulate the production of oil and gas for the prevention of underground waste, can, under the guise of preventing waste, enforce against appellees orders which in fact do not prevent waste but which necessarily operate to compel appellees who are engaged in a private enterprise to divide with others their private contracts for the marketing of natural gas and their pipe line facilities for transporting their gas to their private markets, and at the same time prevent appellees from protecting their properties to the extent of their private market outlets from enormous drainage to the wells of others.

(b) Whether the statute involved is subject to the construction for which appellants contend; and, if so, whether the Legislature of Texas and the Railroad Commission of Texas, under the guise of protecting the correlative rights of all the owners of gas in a common reservoir, can, by statute and by orders in pursuance thereof, take away from appellees their property and property rights in their gas, their private marketing contracts, and their pipe line facilities for transporting their gas to their markets, and confer the same on others who have no interest in same, and at the same time prevent appellees from exercising their clear legal right to protect themselves to the extent

of their market outlets against tremendous drainage to to other wells.

There are other issues and questions presented by this record which will be pointed out later in this brief.

STATUTE INVOLVED.

Appellants' brief is subject to the inference that appellees have attacked House Bill 266 in its entirety. This act contains many provisions. It classifies natural gas as sweet gas, sour gas and casinghead gas, and prescribes the purposes for which each kind of gas may be lawfully used. It contains numerous definitions of waste and prohibits the committing of waste as therein defined. It authorizes the Railroad Commission to regulate the production of gas for the purpose of preventing prohobited waste and, if necessary, to divide a common reservoir into zones as a means of expediting such regulation. It also authorizes the Commission to define and treat as separate zones areas in the same common reservoir which produce sour gas and sweet gas respectively. None of these provisions of the statute is attacked by appellees. While the record does not so show, it as a matter of common knowledge that through these provisions the overground wastage by the strippers has been effectively stopped.

The only provisions attacked are those which, as construed by appellants, purport to authorize the Commission to limit the production of natural gas from the wells of appellees solely to the end that the markets, which without exception are made up of private contracts, belonging to appellees and others similarly situated be supplied from all the wells in the common reservoir, with the inevitable result that appellees would be deprived of their right to supply their private market outlets with their own gas, require them to divide these markets and their pipe

line facilities with others, and prevent them from protecting themselves from heavy losses by drainage.

APPELLEES' POSITION.

We do not assert, as stated by appellants, that the Legislature and the Railroad Commission are without authority to prevent waste of natural gas. We do assert that we and others similarly situated have not committed or caused waste; that the orders attacked were not intended to prevent waste, and, in fact, do not prevent waste. We do not assert, as stated by appellants, that the State of Texas, through its Legislature and Railroad Commission, is without authority in the proper exercise of its police power to protect the correlative rights of owners of gas in a common reservoir. We do assert that we have violated the correlative rights of no owner; that we have acquired extensive reserves of natural gas in the Panhandle gas field; that we have developed these reserves by the drilling of wells thereon; that we have constructed pipe lines to distant centers of population, where, with great expenditure of time and money, we have developed private marketing contracts for the sale of a part of our gas; that the purchase and development of these reserves of gas, the construction of pipe lines, compressor stations and other transportation facilities, and the negotiation of our private marketing contracts represent very large investments of money; that our reserves of gas, pipe line facilities and marketing contracts constitute valuable property; that by reason of tremendous production of naturel gas by other producers, notably the owners of oil wells and the owners of wells connected to stripping plants (who constitute a large majority of those who would benefit from the operation of the statute and orders attacked) and the owners of wells connected to carbon black plants, low pressure areas have been formed and are being

formed, causing tremendous drainage of gas from the properties of appellees against which the latter have not been able to protect themselves with their available market outlets; that in developing and producing their own gas, developing their private market outlets, and in constructing their pipe line facilities they have violated no correlative rights of any other owner in the field, each of whom had the same opportunity to do likewise; that to prevent appellees from protecting themselves against great losses of gas by drainage, and to compel appellees to divide their private marketing contracts and their transportation facilities with those who have not provided themselves with markets and transportation facilities, is to take from appellees valuable property and valuable property rights without due process of law and without compensation and to deny appellees equal protection of the law, in violation of the provisions of both the Federal and State constitutions.

The other contentions upon which appellees rely will be set out later.

STATEMENT OF THE CASE.

The pleadings of appellees are rather long, and we deem it unnecessary to include an elaborate recitation of the allegations. After setting out the facts hereinafter stated and after setting out the articles of the statute attacked (R: 10-15) and referring to the provisions of the orders attacked, the appellees in their bills, which are substantially alike, attacked the statute as construed by appellants and the orders issued by the Railroad Commission of Texas, on the ground that they were conceived and designed for the purpose of forcing appellees and those similarly situated to provide other persons with market outlets and with marketing facilities, and not for the purpose of preventing waste or of protecting correlative rights

(R. 15-24; 86-87); that they necessarily operate to take appellees property and property rights without due process of law and to deny appellees the equal protection of the law, in violation of the Fourteenth Amendment to the Federal Constitution and of Sections 16, 17 and 19, of Article I, of the Constitution of Texas (R. 24-29; 88-93); that they deprive appellees of their liberty and property in violation of the impairment of contracts clause of Section 10, Article I, of the Federal Constitution, and of the above mentioned sections of the Constitution of Texas; and that they operate to take, damage and destroy appellees' property for a purported public use (but in fact a private use) without adequate compensation and without appellees' consent, in violation of Section 17, Article I, of the Constitution of Texas (R. 34-37; 97-100). In each bill the specific particulars to which the constitutional provisions apply are set out. They also allege that the act and orders are unconstitutional and void as against them in that they are violative of the commerce clause of Section 8, Article I, of the Federal Constitution, because they interfere with and unreasonably burden interstate commerce in several particulars specifically pleaded (R. 29-30; 93-94). They allege that the Railroad Commission of Texas, an executive body created under the constitution and laws of the State of Texas, is an executive board clothed only with administrative powers, and plead Section 1, Article II, of the Constitution of Texas, which divides the powers of the State government among three distinct departments: the executive, the legislative, and the judicial; that the powers assumed by the Railroad Commission in issuing the orders under attack involve both legislative and judicial functions, and that the orders are for that reason violative of such constutitional provisions (R. 30-34; 94-97).

Another special attack is made on the act and orders as

violative of the Fourteenth Amendment to the Constitution of the United States and the corresponding provisions of the Texas Constitution in that they set up no definite legislative standard for the direction of the Railroad Commission, and are therefore unreasonable, arbitrary and confiscatory as applied to the properties of appellees (R. 34-37; 97-101).

The orders are specially attacked on the ground that the Commission has failed to carry out the mandate of the statute requiring that it fix a reasonable drainage area and that the apportionment of the gas shall be made on a reasonable basis, which would necessarily mean that the apportionment be made so as to give due effect to the ownership in place of the gas underlying the lands of the respective owners of property within the common reservoir (R. 39-40; 101-105).

The facts pleaded are substantially to the same effect as the findings of fact prepared and filed by the trial court. We think these findings of fact are sustained by the overwhelming weight of the testimony, and in most particulars by the uncontradicted testimony; and we therefore adopt such findings as a proper statement of the facts involved. For the convenience of this Court, we here copy these findings of the trial court:[1]

Findings of Fact.

1.

Plaintiff Consolidated Gas Utilities Corporation is a Delaware corporation with a permit to do business in the State of Texas, and acquired all of the properties of the

1. May we suggest to the Court that it will be very helpful in following the trial court in these findings if it will have before it Exhibits Nos. 5, 15 and 23, the originals of which are on file with the Clerk of this Court as a part of the record?

That each member of the Court may have it before him as he reads this brief, we have placed an exact copy, on a reduced scale, of Exhibit 5 in a pocket on the inside of the back cover page.

Texas Panhandle Gas Company, original plaintiff, and was duly substituted as plaintiff and in lieu of the Texas Panhandle Gas Company in cause No. 539 in equity. The plaintiff Texoma Natural Gas Company is a Delaware corporation with a permit to do business in the State of Texas. Defendants Ernest O. Thompson, C. V. Terrell and Lon A. Smith compose the Railroad Commission of Texas, which is an administrative body created by the laws of the State of Texas, and charged with the duty of promulgating regulations pursuant to and enforcing the statutes of the State of Texas relative to oil and natural gas. The defendant William McCraw is the duly elected and qualified Attorney General of the State of Texas.

2.

There is a diversity of citizenship between plaintiffs and each of the defendants. The amount in controversy in each of said causes exceeds the sum of $3,000.00, exclusive of interest and cost. The issues involved herein relate to the alleged unconstitutionality of House Bill 266, 44th Legislature of Texas, Regular Session, Chapter 120, Vernon's Annotated Civil Statutes of Texas, Article 6008 as amended, and the orders of the Railroad Commission of Texas promulgated thereunder. Said causes, therefore, arise under the Constitution and laws of the United States.

3.

The order of the Railroad Commission dated December 10, 1935, and as carried forward in supplemental orders, divided the Panhandle gas field into two zones, designated respectively as the East Panhandle field and the West Panhandle field. The East Panhandle field consists of the gas producing portions of Wheeler County and the eastern part of Gray County, Texas. The West Panhandle field

consists of Hartley, Moore, Hutchinson, Potter, Carson and the western part of Gray.

3½.

Complainants are engaged in producing natural gas in the Panhandle oil and gas field and transmitting such gas to markets outside the State of Texas.

4.

The Panhandle oil and gas field is an enormous reservoir of natural gas and oil situated in the Panhandle of Texas. It extends from the southeastern portion of Wheeler County in a northwesterly direction across the Counties of Wheeler, Gray, Carson, Potter, Hutchinson, Moore and a portion of Hartley a total distance of approximately 125 miles. In width it varies from 10 miles to 40 miles. The oil and gas is found in folds or strata laid down on the slopes of an ancient granite mountain range, now submerged, extending throughout the length of the field and lying generally on the southwestern side thereof. Some saturated formations are found on the southwestern slope of the old mountain range, but most of the oil and gas producing formations lie on the northeastern slope. The saturated formations descend with the slopes of the mountains to sea level and below. Those portions of the porous formations lying at approximately sea level and below are saturated with water, originally under a reservoir pressure of approximately 430 lbs. per square inch. Just above the water the formations are frequently found to be saturated with oil. Due to the irregularity in the formations, the oil saturated portions of the formations are not continuous throughout the length of the field; but oil pools, numbering 50 or more, occur at irregular intervals along most of the northeast edge of the reservoir. Structurally above the oil and in the same formations enormous quantities of free

natural gas are found. This gas is sometimes found in a number of strata in the same well; and free gas is often found in wells drilled to the oil bearing formations, this gas being deposited in porous strata above the oil and separated from the oil bearing stratum by impervious lenses. Near the edge of the reservoir oil is found in wells in which no free gas is found in strata above the oil, but gas is found in solution with the oil and when produced with the oil is known as casinghead gas.

5.

Gas was first discovered in this field about the year 1919. No extensive developments took place until about the year 1925, when some of the oil pools were discovered. Since the discovery of oil 3,000 wells have been drilled, the great majority of which have been drilled on the northeastern half of the reservoir. The oil and gas when originally encountered were under the same reservoir pressure as the water, and there is free communication between the portions of the formations bearing water, oil and gas respectively. Due to underground natural physical conditions and to the drilling of wells, there is extensive communication between different saturated strata allowing the migration of gas, oil and water from one stratum or layer to another, as well as up and down structure in the same stratum.

6.

Along the north and west sides of the western portion of the field gas is found to be contaminated with sulphur compounds and is known as "sour" gas. To the south and east of the area producing sour gas, the gas is free of sulphur compounds and is known as "sweet" gas. There is no physical barrier between those portions of the formations producing sweet gas and sour gas and there is free migration of gas from the sweet gas area to the sour gas

area, and vice versa. The line of demarcation between the areas producing sweet and sour gas is known locally as the sour gas line.

7.

The entire reservoir embraces approximately 1,400,000 acres. The area producing free gas embraces approximately 1,174,000 acres, of which approximately 270,000 acres produces sour gas and approximately 904,000 acres produces sweet gas. By a north-south line in the so-called Lefors area in eastern Gray County, the Railroad Commission has divided the reservoir into zones or fields, that lying to the east of the line being known as the East Panhandle Field and that to the west as the West Panhandle Field. The area producing free gas in the East Panhandle Field embraces about 181,000 acres, and that producing free gas in the West Panhandle Field about 993,000 acres. The dividing line between the east and west fields or zones is situated in an area of much lower pressure than that of the areas to the east and west thereof. Consequently, there is no migration from the West Panhandle Field to the East Panhandle Field, or vice versa, though there is migration of gas from both these fields into the low pressure areas embracing the dividing line. No complaint is made in this case of this division of the field into zones. All of the sour gas area is in the West Panhandle field. The sweet gas area in the West Panhandle Field, therefore, contains about 723,000 acres.

8.

During the earlier history of the field there was no outlet for any substantial quantity of natural gas and the development was intensified in and around the oil producing areas. No particular value was placed on the gas in these earlier years and deplorable waste of gas occurred in connection with the production of oil. As a consequence of

intensive development in the oil fields and the heavy production of gas from oil wells, low pressure areas soon appeared in all the oil fields. A number of these low pressure areas assumed large proportions, among which might be mentioned the Borger area, the Skellytown area, the Lefors area, and the Wheeler County oil field areas. In addition to these low pressure areas caused from operations in the oil fields, other low pressure areas have been formed during the past two or three years due to intense production of gas in concentrated areas for delivery to stripping plants, where the gas was processed for the recovery of a small quantity of natural gasoline, the residue being popped off or wasted to the air. These last mentioned low pressure areas are for the most part contiguous to or in close proximity to the low pressure areas resulting from operations in the oil fields, and the result is that the entire north side of the field now has very low pressure in comparison with the remainder of the field, the pressure graduating from 50 to 150 lbs. along the northeast or structurally low portion of the field, to the original pressure along the southwestern or structurally high portion of the reservoir. This condition has resulted in the migration of tremendous quantities of natural gas from the southwestern side of the field to the northeastern side of the field. Many of these areas of low pressure are situated in the sour gas producing area, with the result that tremendous quantities of sweet gas have moved out from the sweet gas area into the sour gas area. Upon moving into the sour gas area, this sweet gas becomes blended with sour gas and is produced as sour gas. Without treatment to remove the sulphur compounds, sour gas is unfit for use as fuel for heating and lighting purposes, its use being confined at this time principally to the manufacture of carbon black.

9.

Due to the low reservoir pressure and to the formational resistance to the flowing in of water, no hydraulic drive is exerted by the water found below the oil and gas in the same formations. The water, therefore, does not flow in to replace the oil and gas produced at sufficiently rapid rate to rebuild the pressure to any perceptible degree. In wells drilled to water the water will rise to varying heights in the well bore, the height to which it will rise depending upon the existing reservoir pressure in the immediate vicinity of the well. When the pressure was approximately at the original 430 pounds per square inch, the column of water would rise about 1000 feet in the well bore. As the pressure is exhausted through the production of oil and gas, the height to which the column of water will rise gradually diminishes. This condition renders the Panhandle field free of the hazards of water coning, water channeling and trapping off of oil and gas as a result of too rapid production of oil or gas, which sometimes occur in fields in which an active water drive is present. The only damage that has occurred from the encroachment of water in this field has been that caused from local saturation of formations originally containing oil or gas by water that has come into the bottom of the well and risen in the well bore due to mechanical errors and defects in the drilling, completion and operation of wells.

10.

This field is situated in a thinly populated section of the country. There is no market outlet for sweet gas within the field itself except for fuel in the drilling of wells and in the operation of industries incident to the oil and gas business. Prior to the year 1928 no sweet gas was being sold outside the field except to supply the industrial and domes-

tic needs of the city of Amarillo and smaller towns in the immediate vicinity of the field. About the year last mentioned several groups of individuals and corporations, some of whom already owned extensive reserves of sweet gas in the field, commenced the development of pipe line projects looking to the production of natural gas from this field and transmitting it to distant markets, most of which were located in the so-called Central West, outside the State of Texas. Among these groups were the founders of complainants. Those interested in the organization of complainant Texoma Natural Gas Comany acquired and transferred to complainant approximately 261,000 acres of leases in the proven field. Some of these leases have been released to the land owners; but complainant now owns more than 200,000 acres of leases known to be capable of producing sweet gas. These extensive reserves were acquired and are now held by complainant in order to assure an adequate supply of sweet gas for transmission through its pipe lines to its markets in the city of Chicago and intermediate points. These reserves represent an investment by compainant of approximately $13,000,000.00. At the time of the trial it had drilled about 90 wells on its leases and had constructed a main pipe line from the town of Fritch, in southwestern Hutchinson County, Texas, to a point near the town of Gray, in the State of Oklahoma. It had also constructed a compressor plant at the town of Fritch and had constructed gathering lines connecting its main line with its wells, at an additional cost of several million dollars. An affiliated company, The Natural Gas Pipe Line Company of America, had constructed a large trunk pipe line from the town of Gary, Oklahoma, to Joliet, Illinois, near the city of Chicago, at a cost of more than $35,000,000.00. This affiliated company and Texoma together have expended more than $500,000.00 in efforts to secure market outlets and marketing contracts for complainant's natural

gas. The total investment of complainant and its affiliated company, whose interests constitute one general project, is more than $72,000,000.00. Those interested in the organization of complainant, Consolidated Gas Utilities Company, acquired and transferred to complainant leases and leasehold interests in approximately 10,273.53 acres in the East Panhandle field. On these leases complainant and its predecessors in interest drilled twelve wells, situated on leases aggregating 1473.63 acres, out of three different sections of land. These reserves were acquired and are now held by complainant in order to assure an adequate supply of sweet gas for transmission through its pipe lines to its markets in the cities of Hutchinson and Wichita, in the State of Kansas, and intermediate points. In addition to acquiring its leases and drilling the twelve wells, complainant has constructed a main pipe line leading from a point near its producing leases in Wheeler County, Texas, to the city of Enid, Oklahoma, and on to the cities of Hutchinson and Wichita in the State of Kansas, and has constructed gathering lines connecting its wells with said main pipe line. It has also constructed branch lines leading from its main pipe line to intermediate cities and towns, in which it is selling and distributing gas. Its total investments in its leases, pipe lines and connections aggregate more than $10,000,000.00. In addition to these sums complainant has expended substantial amount in conducting negotiations for the marketing of its gas at points outside the State of Texas. As a practical matter, it would have been most difficult, if not impossible, for complainants and their affiliated company to finance the building of their pipe lines, compressor plants and other essentials of their project unless complainants had acquired their reserves of gas so as to place them at all times in position to insure the delivery of gas for transmission through the pipe lines as rapidly as markets could be developed; and the development of

their markets would have been almost, if not quite, impossible had not complainants and their affiliated company been in position to guarantee delivery of the full quantity of gas desired by their customers as needed.

11.

Natural gas cannot be stored as can most other commercial commodities. It can be delivered to the ultimate consumer only by pipe lines connecting the wells at the source of supply with the burner tips of the consumers. For this reason it is necessary that there be a continuous flow of gas available from the wells to the points of consumption.

12.

The circumstance that gas cannot be stored or transmitted to markets except by pipe lines and the enormous cost of pipe lines over the distances between the Panhandle gas field and centers of population combine to bring about a situation where there is no field market for any substantial quantity of sweet gas. Natural gas is in competition with other fuels, such as coal, fuel oil, and coke oven gas, and the development of markets is attended with protracted negotiations involving heavy costs. These negotiations culminate in private contracts for the sale and purchase of natural gas, in the case of complainant Consolidated, at points distant from the Panhandle. Most of these private contracts are performable by complainant at the cities of Enid, Oklahoma, Hutchinson, Kansas, and Wichita, Kansas, and other cities and towns between the city of Enid, Oklahoma, and the city of Wichita, Kansas. In the case of complainant Texoma, most of these private contracts are performable by complainant and its affiliated company near the city of Chicago, Ill. This complainant is producing gas and transmitting it through its pipe line to Gray, Oklahoma, where it is delivering this gas to its

affiliated company under a written contract of sale and purchase. Since these contracts form the basis of complainant's outlet for its reserve of natural gas, and will enable complainant to produce and sell great quantities of gas from its reserves of natural gas, much of which would otherwise be lost to complainant through drainage to low pressure areas, these contracts constitute very valuable property to complainant.

13.

In addition to the pipe lines of complainants and their affiliated companies other pipe lines have been constructed for the purpose of transmitting gas from the Panhandle field to distant centers of population. These include pipe lines to Kansas City, Missouri, and intermediate points; to eastern Indiana and intermediate points; to Denver, Colorado, and intermediate points; to St. Paul and Minneapolis, Minnesota, and intermediate points; to cities in North Texas and to the city of Lubbock, Texas. Three of these pipe lines acquired their reserves in the East Panhandle field, and the remaining six, including complainant (Texoma) acquired their reserves in the West Panhandle field. All together the owners of these pipe lines own about 80 per cent of all the reserves of sweet gas, in the field, and about 62 per cent of all the gases, including both sweet and sour gas, contained in the reservoir.

According to the estimates of a competent engineer, whose estimates were not contradicted, the formations underlying complainant Consolidated's leases as of October 1, 1935, aggregated about 101,900,000,000 cubic feet of gas. At the time of the trial, which was in midwinter, complainant was producing and marketing from its twelve wells about 25,000,000 cubic feet of gas daily. The orders attacked limited the production from complainant's wells to less than half of its total market outlets. The average

production through the year from complainant's wells is about 19,000,000 cubic feet daily. The maximum per cent which complainant has taken from any one well has been 12.9 per cent of its potential open flow. The average taken from all its wells from the beginning has been 4.89 per cent of the potential open flow. The highest per cent of the daily potential ever taken over a period of one month for the entire twelve wells has been 6.53 per cent. Complainant (Consolidated)[1] has recovered from its twelve wells a total of 45,214,776,000 cubic feet of gas, an average of 4,490,000 cubic feet per acre from its entire leases, and an average of 30,620,000 cubic feet per acre from the 1473.53 acres on which its twelve wells are located.

According to the estimates of competent engineers, the original reserves of free gas in the West Panhandle field aggregated about 14,986,752,696,000 cubic feet measured at an assumed absolute pressure of 16.4 lbs. to the square inch. Of this approximately 11,309,091,686,000 cubic feet was sweet gas, and 3,667,661,000,000 cubic feet was sour gas. Approximately 20 per cent of the total reserves of gas, including both sweet and sour, in the West Panhandle field originally underlay the leases now owned by complainant (Texoma).[1] At the time of the trial of this case the production from the West Panhandle field had aggregated 4,427,642,131,000 cubic feet. Of this total the pipe lines, with an ownership of 56 per cent of the total reserves, have produced only 529,545,454,000 cubic feet, while the owners of the other 44 per cent have produced 3,898,096,776,000 cubic feet. Complainant (Texoma),[1] with an ownership of approximately 20 per cent of the total reserves, had produced only 98,808,409,000 cubic feet, or 2.25 per cent of the total withdrawals from the West Panhandle field.

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1. Insert ours.

15.

The leases and reserves owned by the pipe lines, including those owned by complainant, are located in the sweet gas area on relatively high structural positions. Most of the other gas wells and all of the oil wells are located on lands lying between the reserves of the pipe lines and the northeast or structurally lower edge of the reservoir.

16.

On their reserves and leases the pipe lines have drilled 293 wells in the West Panhandle field. Those owning other leases in the West Panhandle field have drilled 180 wells producing sweet gas and 211 wells producing sour gas, or a total of 391 wells. The leases on which the wells owned by the pipe lines are located aggregate 523,065.97 acres, an average of about 1,785 acres per well. From these developed leases they have produced a total of 529,545,454,000 cubic feet of gas, or an average of 1,157,000 cubic feet per acre. Complainant's (Texoma's)[1] 90 producing wells are located on developed leases aggregating 81,928.44 acres, an average of 911 acres for each well, and have produced a total of 98,808,489,000 cubic feet, or an average of 1,312,000 cubic feet per acre. The 180 sweet gas wells in the West Panhandle field not connected to pipe lines are located on leases aggregating 30,096 acres, an average of 167 acres per well. These wells have produced a total of 418,652,466,000 cubic feet or an average of 13,900,000 cubic feet per acre. The 211 sour gas wells are located on leases aggregating 33,750 acres, an average of 159 acres for each well. These wells have produced a total of 496,635,182,000 cubic feet, an average of 14,700,000 cubic feet per acre.

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1. Insert ours.

17.

The average rock pressure of the 293 sweet gas wells in the West Panhandle field owned by the pipe line companies, at the time of the last official test prior to the trial, was 364.5 lbs. per square inch. (That)[1] of the 201 wells connected to pipe lines in the East Panhandle field 315 lbs. per square inch. The average rock pressure of complainant's (Texoma's)[1] 90 producing wells was 336.8 lbs. per square inch. That of the 180 sweet gas wells in the West Panhandle field, not connected to the pipe lines, was 233 lbs. per square inch, and that of the 211 sour gas wells was 220 lbs. per square inch.

The average for the 121 wells (in the East Panhandle field)[1] not connected to pipe lines was 222 lbs. per square inch. The average for the 391 wells in that (West Panhandle)[1] field not connected to pipe lines was 226 lbs. per square inch. These 391 wells in the West Panhandle field not connected to the pipe lines are practically all located between the 293 wells belonging to the pipe lines and the low pressure areas along the northeast side of the reservoir. *By reason of these differentials in pressure between the wells connected to pipe lines and those not connected, the migration or drainage as a whole is from the wells connected to pipe lines, including those connected to complainant's pipe lines, to the wells not connected to pipe lines.*[2] All along the northeast slope of the structure in the East Panhandle field there is an extremely low pressure area, where tremendous quantities of gas have been produced in connection with the operation of oil wells and wells connected to stripping plants. The general drainage in the East Panhandle field is from the areas of high pressure toward and to these low pressure areas. The majority of the wells not connected to pipe lines are situated in these

1. Insert ours.
2. Italics ours.

low pressure areas or between these low pressure areas and the high pressure areas to the south and west thereof, in which areas of higher pressure the wells connected to the pipe lines are situated. *The twelve wells of complainant (Consolidated)*[1] *are situated near the areas of low pressure, and the rock pressure of these wells and of other wells similarly situated with reference to the low pressure areas tends to show that had complainant not produced its market requirements from these twelve wells they would probably have substantially the same rock pressure as now obtaining, due to the heavy migration from the areas in which these wells are situated to the low pressure areas immediately to the northeast thereof.*[1] Very large quantities of gas have migrated from the reserves of the pipe lines, including the reserves of complainants, to the low pressure areas in and around the oil fields on the northeast slope of the reservoir and to the areas on which most of the 391 wells belonging to others than the pipe lines in the West Panhandle field are situated. Without regard to the rate of withdrawal in the existing areas of low pressure, the migration of gas from the reserves of the pipe lines to those areas of low pressure will continue over a long period of time.

18.

322 gas wells have been drilled in the East Panhandle field. Of these 201 wells are connected to pipe lines, 105 have been connected to stripping plants, and 16 were not connected to any outlet at the time of the trial except in some instances for the purpose of supplying fuel to drilling wells. The leases on which the wells connected to pipe lines are located have produced an average of 8,116,000 cubic feet of gas per acre, and those on which the wells connected to stripping plants are located have produced an average of 16,662,000 cubic feet per acre.

1. Insert ours.

19.

The 201 wells in the East Panhandle field connected to pipe lines are scattered and distributed throughout practically the full length of the field. The 121 wells not connected to pipe lines are similarly distributed, though often in more concentrated areas, and practically all of these wells lie between the wells of the pipe line companies and the low pressure areas resulting from oil field and stripping operations or lie within such low pressure areas.

20.

The fact that 105 wells in the East Panhandle field not connected to pipe lines have been produced at a much higher rate than have the wells in that field connected to pipe lines, and that 16 wells in that field have never been produced, has caused no coning or channeling of water into the formations saturated with oil or gas, or the trapping off by water of recoverable oil or gas, nor has the quantity of gas ultimately recoverable been reduced by reason of such unequal rates of withdrawal. No underground waste of oil, gas or reservoir energy has resulted from such unequal withdrawals.

21.

The orders attacked restrict the production from gas wells situated in the sweet gas area of the West Panhandle field, embracing 723,000 acres of land, to 602,000,000 cubic feet daily for the month of January, 1936. The total allowable production is the volume which resulted from adding the combined market outlets of those who are producing and marketing natural gas, most of which are the distant markets of the pipe lines, made up of private marketing contracts as above stated. The orders require that the total volume of allowable production be apportioned among

all of the wells producing from the sweet gas area, 293 of which belong to the pipe lines, and 180 of which belong to other owners.

22.

In the orders of the Railroad Commission no provision is made for and no account is taken of the leases belonging to the pipe lines or others on which no wells have been drilled; nor is any provision made for or account taken of producing acreage included within large leases in excess of 640 acres in the West Panhandle, and 160 acres in the East Panhandle for each well.

22½.

The consumers' demand for natural gas varies greatly from season to season and substantially from day to day, the demand going up in cold weather and down in warm weather. To meet this situation the pipe lines which obligate themselves to deliver gas at distant points must provide themselves with facilities to enable them to deliver the maximum consumer requirements; and when these consumer requirements decrease with changing weather conditions, a portion of the facilities for transmitting the gas are not used. This circumstance requires the owners of pipe lines to make larger investments in their transportation facilities than would be necessary to transport the same quantity of gas to market during the year if the consumers' demand were constant from day to day.

23.

The owners of wells connected to pipe lines, including complainants, have always produced their wells in a prudent and skilful manner and in accordance with the most approved methods of production, without committing or causing physical waste.[1] At the time of the trial, which was

1. Italics ours.

mid-winter, complainant was producing its wells at the rate of about 10 per cent of their daily potential producing capacity. The average for the pipe lines in the West Panhandle field as a whole was substantially less. This average throughout the year has been and will be substantially less than the average at the time of the trial of this case. About 151 of the 180 sweet gas wells not connected to pipe lines have been producing at rates greatly in excess of the rate at which the pipe lines' wells have been produced. These 151 wells, located on 19,669 acres, have produced an average of 21,300,000 cubic feet per acre, whereas the 293 wells connected to the pipe lines have produced only 1,157,000 cubic feet per acre. 61 of these wells were formerly oil wells and have produced large quantities of gas along with the oil. 29 of the 180 wells not connected to pipe lines have never produced. Practically all of these 29 wells are located in areas where the reservoir pressure has been reduced by oil field and stripping operations to levels much lower than the average reservoir pressure of complainant's wells and the other wells connected to pipe lines.

24.

The 293 wells in the West Panhandle field connected to pipe lines are scattered and distributed throughout practically the full length of the field. The 180 wells not connected to pipe lines are similarly distributed, though often in more concentrated areas, and practically all of these wells lie between the wells of the pipe line companies and the low pressure areas resulting from oil field and stripping operations or lie within such low pressure areas.

25.

The fact that 151 wells not connected to pipe lines have been produced at a much higher rate than have the wells connected to pipe lines, and that 29 sweet gas wells in the

West Panhandle field have never been produced, has caused no coning or channeling of water into the formations saturated with oil or gas, or the trapping off by water of recoverable oil or gas, nor has the quantity of gas ultimately recoverable been reduced by reason of such unequal rates of withdrawal. No underground waste of oil, gas or reservoir energy has resulted from such unequal withdrawals.

26.

The production from their own wells by complainant and other pipe lines of the quantity of gas required from time to time to fulfill their marketing contracts and requirements *will cause no coning or channeling of water, no trapping off of recoverable oil or gas, no underground waste of oil, gas or reservoir energy or reduction of the total quantity of recoverable gas from the field,*[1] even though the other wells in the sweet gas area of the West Panhandle field be produced at a much lower rate or be not produced.

27.

Before House Bill 266 went into effect, grossly wasteful practices in the production of natural gas in the Panhandle field were occurring, with the result that enormous quantities of gas were wasted. Most of this waste was due to the extravagant production of natural gas from oil wells and to the production of gas from gas wells and processing such gas for the extraction of a very small quantity of natural gasoline therefrom and popping or wasting to the air the residue gas, which constituted 97 per cent of the fuel value of the gas in its original state. The production of gas from oil wells has been practically without restriction throughout the history of the field. The production of gas by those who were stripping it of its natural gasoline content and wasting it to the air has been at a tremendously greater

1. Italics ours.

rate than the production of gas from wells connected to pipe lines. *No evidence was offered—indeed, it was not even seriously claimed—that anything complainant (s) had done or contemplated doing has, in the slightest degree, contributed or will contribute to that waste.*[1]

28.

Under the orders attacked, it is impossible for complainant and several other pipe lines owning wells and leases in the Panhandle field to supply their marketing requirements and contracts from their own wells. The drilling of additional wells will not cure this situation, for the reason that so long as there are wells in the same field not connected to pipe lines and the total production is limited to the total market outlets, substantially all of which are the private marketing contracts and commitments of the pipe lines, and this production is distributed among all the wells, including those not connected to pipe lines, complainant(s) and the other pipe lines similarly situated will be unable to supply their marketing contracts from their own wells. In order to comply with their marketing contracts and commitments, complainant and others similarly situated will be required to purchase gas from the owners of the wells in the field not connected to pipe lines, notwithstanding the pipe lines have an abundant supply of their own gas to fulfill all their marketing contracts and commitments.

30.

The terms and provisions of the orders attacked, the necessary operation and effect of such orders, the history of the field and other pertinent facts as disclosed by this record conclusively establish that the purpose of the Commission underlying the orders was, upon a theory of protecting correlative rights, to coerce complainant and others

1. Italics ours.

similarly situated to buy gas from, and thus to share their private marketing contracts and commitments and the use of their pipe lines and other facilities for transmitting their gas to market with, the owners of wells not now connected to pipe lines, who have not contributed in money, services, negotiations, skill, forethought or otherwise to the development of such markets and the construction of such pipe lines and other facilities. In short to compel complainants to afford markets to those having none.

31.

The necessary operation and effect of such orders is to take from complainant and others similarly situated substantial and valuable interests in their private marketing contracts and commitments and in the use of their pipe lines and other facilities for transmitting their gas to their markets, without compensation, and to confer same upon the owners of the approximately 180 sweet gas wells in the field not connected to pipe lines. (R. 167-183.)

ADDITIONAL FINDINGS OF FACT.

1.

The natural gas pipe lines which withdrew gas from the Panhandle gas field supply gas to many of the principal cities and towns of the United States, including Chicago, Illinois; Des Moines, Iowa; Omaha, Nebraska; Sioux City, Iowa; Kansas City, Missouri; St. Paul, Minnesota; Indianapolis, Indiana; Denver, Colorado; Minneapolis, Minnesota; and Fort Worth and Dallas, Texas. Gas from the Panhandle gas field is supplied for domestic and industrial light and fuel purposes to approximately 10,000,000 persons of the United States. Said gas field is the largest natural gas field in the United States.

2.

There are six major natural [gas] pipe line companies which withdraw gas from the West Panhandle field; and there are three major pipe line companies which withdraw gas from the East Panhandle field. In addition, there are several smaller companies which withdraw gas from said field for distribution to towns and cities which are close to said field. Practically all of the sweet natural gas which is produced from gas wells in the Panhandle field is used for the purpose of supplying the cities and towns of the United States with such gas for domestic and industrial heat and light purposes. Only an insignificant portion of the total sweet gas produced in said Panhandle field is used in the field.

3.

The practical effect of House Bill 266 is to restrict the production of sweet gas from gas wells until such gas can be utilized for light and fuel purposes. Plaintiffs, and those companies similarly situated, being the pipe line companies which produce and transport gas from said field for light and fuel purposes, for all practical purposes at present constitute the only outlet in the field for sweet gas for the purposes permitted by the statute.

4.

There are 517 sweet gas wells in the West Panhandle field, of which 180 sweet gas wells do not have an outlet for light and fuel purposes. There are 322 sweet gas wells in the East Panhandle field, of which 121 wells do not have an outlet for light and fuel purposes. Prior to the effective date of House Bill 266 the laws of the State of Texas permitted the use of sweet gas in the Panhandle field for any beneficial purpose where the owner of the well was not able

to secure outlets for light and fuel purposes and under such laws many of the wells which are now unconnected did have an outlet for their gas, either for the purpose of extracting the natural gasoline content of said gas or for the manufacture of carbon black, or both. Upon House Bill 266 becoming effective, however, these outlets and uses were made unlawful and these wells, along with many other wells in the field which have never had connection for any purpose, became without an outlet for the purposes and uses permitted by House Bill 266.

5.

The law which authorized the use of natural gas in the Panhandle field for any beneficial purpose where no outlet for light and fuel could be secured was passed in 1933. Under the operation of said law more than one billion cubic feet of gas per day produced from said Panhandle field was being wasted into the air after the gasoline content of such gas had been extracted. The enormous quantity of gas which these plants used and especially the enormous quantity of gas which was being daily allowed to escape into the air, seriously endangered the interests of those who were concerned with preserving the sweet gas reservoir for the production of gas for light and fuel purposes, including the interests of plaintiffs in these cases. Conservation associations were organized, which had for their purpose the creation of a public sentiment which would be against the continuation of the operations of natural gasoline or stripping plants which popped, or permitted the escape of, gas into the air. Texoma Natural Gas Company was a prime mover in the organization and activities of such conservation association, and said company contributed both the time of its agents and its money to foster a public sentiment which would persuade the Legislature of Texas to repeal the laws which permitted the popping off

or escape of natural gas in connection with stripping operations.

An investigating committee was appointed by the Senate of the Forty-third Legislature of Texas in 1933 for the purpose of investigating the conditions in the Panhandle Gas field brought about by the operation of the laws which permitted stripping operations. This committee held exhaustive hearings in Amarillo, Texas. In addition to hearing many witnesses, a complete report of conditions which exist in the field, together with a recommendation for their solution, was submitted to the Railroad Commission of Texas by such committee. As a result of its investigations, a report was sent to the Senate of the Forty-third Legislature in which the Committee recommended that a law be enacted which would prohibit the use of sweet gas except for light and fuel purposes and which would also provide for a system of ratable production distributed among the owners of all sweet gas wells in the common reservoir. Subsequent to the adjournment of the Forty-third Legislature, the Conservation Association, which Texoma National Gas Company was helping to finance, persuaded many members of the Forty-fourth Legislature of Texas to visit the Panhandle gas field and observe the conditions and operations which were being conducted therein. The sponsors of said visits, had for their purpose the repeal of the existing laws and the enactment of a comprehensive statute designed to remedy the evils existing in the Panhandle gas field. In addition, representatives of Texoma Natural Gas Company appeared before the Forty-fourth Legislature, which had the proposed gas legislation up for consideration, and advocated special legislation which would remedy the existing evils. The Committee of the House of Representatives and the Senate of the Forty-fourth Legislature, prior to the enactment of House Bill 266, held extended and exhaustive hearings for the purpose of investigating the con-

ditions which existed in the gas fields of Texas, and especially the Panhandle gas field, and to arrive at appropriate remedies. At such hearings the representatives of all the natural gas pipe line companies, owners of producing gas wells, owners of plants which made use of natural gas, and members of the public generally were given an opportunity and did appear and give testimony before such committees. (R. 186-189.)

The legal principles applied by the trial court in granting the decrees from which appellants appeal are set forth in the conclusions of law filed by the trial court, which are, for the convenience of the Court, also copied here:

CONCLUSIONS OF LAW.

1.

The statutes attacked are waste statutes. The Legislature did not intend by this statute to authorize the Railroad Commission of Texas to prorate or limit the production of natural gas except for the purpose of preventing waste as defined by the act. In the event it should become necessary for the Railroad Commission to issue orders prorating or restricting the production of gas in order to prevent waste, the provisions of the statute under attack pertaining to correlative rights require the Commission to adjust the allowable to each owner so as to enable each owner to recover a quantity of gas substantially equivalent in amount to the recoverable gas under his land, and to limit the owner of a smaller tract to his just proportion of the gas produced.

2.

Since nothing complainant has done or contemplated doing has, in the slightest degree, contributed or will contrib-

ute (to)[1] waste as defined by the statute, and since the restriction of complainant's production to a quantity below its absolute needs in the fulfillment of its market requirements was not, in the slightest degree, related to the prevention of waste, the orders attacked cannot be sustained as waste measures, but must be held invalid as applied to complainant's wells.

3.

The orders under attack transcend public necessity and are confiscatory as applied to complainant, for which reason they are invalid as applied to complainant's wells.

4.

The underlying purpose of the Railroad Commission in issuing and attempting to enforce the orders attacked as shown by the effect of the orders is not to prevent waste, but to coerce complainant and others similarly situated to provide markets and marketing facilities for others.

5.

If, by the enactment of the statutory provisions under attack, the Legislature of Texas intended to empower the Railroad Commission to issue and enforce orders limiting and prorating the production of gas except for the purpose of preventing waste as defined in the statute, the Act and orders attacked are invalid and unenforceable as against complainant for the following reasons:

(a) Their necessary operation and effect is to confiscate, without compensation, complainant's private markets, developed by it as a means of disposing of its own gas reserves, and devote them to others, who have no interest in such markets and who have contributed nothing to their development.

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1. Insert ours.

(b) Their necessary operation and effect is to confiscate the use of complainant's pipe lines and other facilities for transmitting their gas to market, which it has constructed at enormous cost, as a private enterprise, for transmitting its own gas to its own private markets, and, without compensation, to devote it to the use of those who have no interest in same and who have contributed nothing to the construction or cost of such facilities.

(c) Their necessary operation and effect is to prevent complainant from protecting itself, to the extent that it is able to market its gas, against the enormous losses by drainage now occurring, and which will continue to occur, from its leases located in areas of high pressure to existing low pressure areas.

(d) They serve no public interest.

They operate, therefore, to confiscate and take from complainant its property and the use of its property without due process of law, and deny complainant the equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States, and of Sections 16, 17 and 19, of Article I, of the Constitution of Texas, to deprive complainant of its liberty and its property, in violation of the impairment of contracts clause of Section 10, Article I, of the Constitution of the United States, and to take, damage and destroy complainant's property for a purported public, but in fact private, use, without compensation and without complainant's consent, in violation of Section 17, of Article I, of the Constitution of Texas.

6.

Under the established laws of Texas, the correlative rights of persons owning lands or leases in a common source of supply of natural gas are the right to produce and the right to use all the gas that may be produced from their respective tracts so long as such production and use

do not cause waste. House Bill 266 does not purport to create any new rule of property in Texas or to redefine the correlative rights of owners of lands within a common source of supply of natural gas as they have long been declared and defined. While this is the inescapable construction of the Act if all constitutional questions are laid aside, we hold that, if its construction be approached in the light of constitutional limitations, the conclusion is further compelled that the statute was not intended to have and cannot be given the meaning for which respondents contend, to the effect that the Act should be construed as authorizing the Commission to prorate production, in the absence of waste, on the mere consideration of compelling the owners of private market outlets and facilities for transmitting gas to market to share them with those not interested in same.

7.

Under a well established rule, we are required to give the legislative act under attack a construction that would render it constitutional rather than unconstitutional, to give it a meaning, if its terms permit it, which does not put it in opposition to the fundamental law. This principle imperatively demands that we construe the statute as we have construed it; for any other construction would place the Act in direct and fatal opposition to both the State and the Federal Constitutions, as heretofore stated. In addition, if the Act be construed as intended to appoint the Commission as a body to ascertain and partition rights of oil and gas owners, it would be in palpable and direct violation of Section 1, Article II, of the Constitution of Texas, in that, contrary to that provision, it would be an attempt to delegate to the Commission both legislative and judicial powers, leaving to it at will, by regulations of its own devising, to take from one and give to others property and rights in property and the use thereof. (R. 183-186.)

SUMMARY OF APPELLEES' ARGUMENT.

In this brief appellees will not follow the same order in considering the issues presented as did appellants. We shall present our affirmative views on the controlling questions, and in the same connection shall reply to the contentions of appellants bearing on these questions.

First we shall demonstrate that the statute and orders cannot be enforced against appellees on any theory of preventing waste. Their underlying purpose was not to prevent waste, but to coerce appellees and others similarly situated to provide markets and marketing facilities for others owning gas wells in the Panhandle field. Appellees have neither committed nor caused waste, and the orders under attack have no reasonable relation to the prevention of waste. The orders transcend public necessity, and are therefore arbitrary and confiscatory as applied to appellees and those similarly situated. Appellees having raised in their pleadings serious questions of confiscation in violation of the provisions of the Constitution of the United States, it is within the power of the court, and it is the duty of the court, to exercise its own independent judgment in determining the questions of fact. This being in part a statutory appeal from orders of the Railroad Commission of Texas, the court, under the Texas statutes, was not bound by the fact findings of the Commission, but was required for itself to determine the weight of the testimony and the credibility of the witnesses in a *de novo* hearing. The court having heard the facts and having arrived at its own conclusions from evidence clearly sustaining its findings, the statute, as construed by appellants, and the orders are properly struck down.

The trial court correctly held that the statute authorized the Commission to limit the production of gas to the mar-

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The trial court correctly held that the statute authorized the Commission to limit the production of gas to the mar-

ket demand only when necessary to prevent waste. Appellants rely on the history of the legislation and the character of the problem before the Legislature as supporting their contention that the statute directs the Commission to limit the production of gas to the market demand without regard to the existence of waste. The history of the legislation—that is, the history of the controversy leading up to the legislation—shows that the problem before the Legislature was to correct the shameful and profligate overground wastage that prevailed in the Panhandle gas field. This wastage threatened the very life of the field and the public had become greatly alarmed. The statute unequivocally prohibited the wasteful practices of the gas strippers without regard to the validity of the provisions of the statute here under attack. If it be granted that the statute is subject to the construction that the Legislature intended by the statute to coerce the pipe lines, which were guilty of no waste, to provide a market and marketing facilities for the use of those guilty of this terrible waste, such construction of the statute would render it unconstitutional. It was the duty of the trial court, if possible, to so construe the statute as to render it valid. But if the statute were subject to the construction for which appellants contend, neither the statute nor the orders could be upheld on any theory of protecting correlative rights.

The correlative rights of persons owning lands or leases in the common source of supply of natural gas are the right to produce and the right to use for lawful purposes all the gas that may be produced from their respective tracts so long as such production and use do not constitute or cause waste. These rights are vested, and are protected by the provisions of the Federal and State constitutions pleaded by appellees. The statute does not purport to change these correlative rights. Appellants admit this, but assert that the statute and orders merely operate as regulations to pro-

tect existing rights. Far from protecting these correlative rights, the necessary operation of the statute, as construed by appellants, and of the orders is to take away from appellees their right to so produce and use their gas, and to take away enormous quantities of their gas and substantial interests in their private marketing contracts and in the use of their facilities for transporting their gas to market, and confer on other owners property and rights which they do not possess, namely, enormous quantities of appellees' gas and substantial interests in appellees' private marketing contracts and in the use of their private facilities for transporting their own gas to their markets.

The statute, as construed by appellants, and the orders serve no public interest, but operate only in the interest of private owners of gas wells, who have not provided themselves with markets and marketing facilities.

Texoma is not estopped to invoke the protection of the constitution by reason of its having advocated legislation to stop wastage of gas.

We shall show also that, as construed by appellants, the statute under attack is vague and indefinite and prescribes no legislative standard of regulation governing the Railroad Commission, and such statute is therefore arbitrary and unreasonable and operates to take appellees' property and the use of their property in violation of the Fourteenth Amendment to the Federal Constitution.

The act, as interpreted by appellants, is void for the further reason that under its terms the Legislature purports to delegate to the Railroad Commission, an executive board, functions which are purely judicial and other functions which are purely legislative, in violation of the provisions of the Texas constitution pleaded by appellees.

The drainage areas fixed by the Commission in the orders are arbitrary and unreasonable as applied to appel-

lees. So also is the formula allotting 50 per cent of the production from the field to the potential producing capacity of the well.

The statute and orders are void as against appellees because they afford no protection to the undeveloped proven reserves of gas acquired and held as a necessary part of their project.

ARGUMENT.

I.

The Statute and Orders Cannot Be Enforced as Against Appellees on Any Theory of Preventing Waste.

In their brief (pp. 177-232) appellants contend that the physical facts are entirely different from the facts as found by the trial court. Under Rule 27 of this Court, Paragraph 2(e), appellants' brief must contain a specification of such of assigned errors as are intended to be urged. *New York ex rel., Rosevale Realty Co.* v. *Kleinert,* 268 U. S. 646, 69 L. E. 1135; *Benites* v. *Hampton,* 123 U. S. 519, 31 L. E. 260; *Camden* v. *Stuart,* 144 U. S. 104, 36 L. E. 363; *Grand Trunk Ry. Co. of Canada* v. *Ives,* 144 U. S. 408, 36 L. E. 485. Nowhere in the specifications of errors to be urged listed by appellants in their brief (pp. 11-12) is there a specification of any assigned error directed at specific findings of fact by the trial court. Appellants must have assumed that Specification No. 4 would entitle them to attack the findings of fact by the trial court on the question of waste; but we think this specification is clearly directed to the general conclusion of fact reached by the court and is not directed to any specific finding or findings that would entitle appellants to contend that such findings are not sustained by the evidence.

1. THE UNDERLYING PURPOSE OF THE ORDERS IS NOT TO PREVENT WASTE BUT TO COERCE APPELLEES AND OTHERS SIMILARLY SITUATED TO DIVIDE THEIR MARKETS AND MARKETING FACILITIES WITH OTHERS.

The findings of fact and conclusions of law filed by the trial court sustain the position of appellees on this point. It found *that the terms and provisions of the orders at-*

tacked, the necessary operation and effect of such orders, the history of the field, and other pertinent facts as disclosed by this record, conclusively establish that the purpose of the Commission underlying the orders was, upon a theory of protecting correlative rights, to coerce appellees and others similarly situated to buy gas from, and thus to share their private marketing contracts and commitments and the use of their pipe lines and other facilities for transmitting their gas to market with, the owners of wells not connected to pipe lines, who have not contributed in money, services, negotiations, skill, forethought, or otherwise, to the development of such markets and the construction of such pipe lines and other facilities,—in short, to compel appellees to afford markets to those having none (R. 182-183); that the necessary operation and effect of such orders is to take from appellees and others similarly situated substantial and valuable interests in their marketing contracts and commitments and in the use of their pipe lines and other facilities for transmitting their gas to their market, without compensation, and to confer same upon the owners of approximately 180 sweet gas wells in the field not connected to pipe lines (R. 183).

In its conclusions of law the court held that the underlying purpose of the Railroad Commission in issuing and attempting to enforce the orders attacked, as shown by the effect of the orders, is not to prevent waste but to coerce appellees and others similiarly situated to provide markets and marketing facilities for others; that the necessary operation and effect of the orders is to confiscate, without compensation, appellees' private markets, developed by them as a means of disposing of their own gas reserves, and to confiscate the use of their pipe lines and other facilities for transmitting their gas to market, which they had constructed at enormous cost as a private enterprise for transmitting their own gas to their private markets, with-

out compensation, and to devote them to others who have contributed nothing to the cost of developing such markets or constructing such facilities (R. 184); that the necessary operation and effect is to prevent appellees from protecting themselves to the extent that they are able to market their gas against the enormous losses by drainage now occurring and which will continue to occur from their leases located in areas of high pressure to existing low pressure areas (R. 185).

These findings and conclusions are abundantly sustained by the record. The history of the controversy reflected by this record and by the records and reports of decided cases demonstrates without cavil that the appellants have never concerned themselves with preventing the wastage of natural gas in that field; that their sole concern has been to coerce the pipe lines, including appellees, to give up an interest in their markets and in the use of their pipe lines to persons who have not provided themselves with markets and pipe lines, notwithstanding the circumstance that the courts have repeatedly held that they are without power to do so. The necessary effect and operation of the orders conclusively establishes the fact of such purpose; for the orders do not prevent waste but do force appellees to provide markets and marketing facilities for others.

The trial court is in a specially good position to understand fully and clearly the physical conditions obtaining in the great Panhandle gas field. Four times these facts have been reviewed at length before the trial court. Circuit Judge Hutcheson has presided at all four of the trials. Four different District Judges have sat with him. These five judges have all reached the same conclusions as to the facts. The first group of cases was *Texoma Natural Gas Co.* v. *Railroad Commission of Texas*, and three companion cases, reported in 59 Fed. (2) 750, in which the court, in the fourth section of the opinion, page 753, observed that

while the act purports to conserve oil and gas as natural resources of the State, defendants concede that plaintiffs' operations do not result in waste. In those cases the court struck down as unconstitutional a statute expressly declaring all gas pipe lines to be common purchasers of gas and requiring them to divide their markets and marketing facilities with the owners of other gas wells in the same field. The next group of cases, *Texoma Natural Gas Co.* v. *Terrell, et al.*, and one companion case, reported in 2 Fed. Sup. 168, involved an attack upon an order requiring that all wells in a portion of the field be shut down and that all other wells in the field be limited to 4 per cent of their potential capacities until there should be a market outlet for all wells in the field. In these cases the court said that the evidence established incontrovertibly that plaintiff's properties were being operated in a wise, prudent and skilful manner; that no waste was being committed by plaintiffs when the order was entered; that none had been or would be committed; that it was established in the same incontrovertible way that the purpose and effect of the order was not to prevent or diminish waste, but to force plaintiffs to purchase gas from wells having no market outlet. The third group of cases was *Canadian River Gas Co.* v. *Terrell, et al.*, and two companion cases, reported in 4 Fed. Sup. 222, involving a statute and orders resembling in essential respects the statute and orders here under attack. In their answers in two of these cases the defendants, who are the same as appellants here, admitted that there was no actual physical waste caused by the production by the pipe lines from their gas wells, except to the extent that the operations of the pipe lines might affect the rights and conduct of other operators in the same field. They sought to uphold the statute and orders as sustainable upon the theory of correlative rights attaching to owners of gas in a common pool, and, in the alternative, on the theory that the order was sustainable because it had a valid and reasonable

relation to the prevention of waste in that, in the absence of such an order, the Commission would have to permit other owners to make a wasteful disposition of their gas. No contention was made that underground physical waste or reduction in the quantity of recoverable gas would result from the operation of wells belonging to the pipe lines while other wells might not be producing gas.

Not until the present controversy have appellants ever asserted that the underlying purpose, or one of the underlying purposes, of the statutes and orders, all of which operated to force appellees, and those similarly situated to divide their markets and marketing facilities with others, was to prevent underground waste of gas or increase the ultimate recovery of gas. Indeed, the original order entered by the Railroad Commission under purported authority of the statute here under attack contained no reference to or finding on waste. This appears affirmatively from the opinion of the trial court on application of Texas Panhandle Gas Company, predecessor of appellee Consolidated Gas Utilities Corporation, for interlocutory injunction. *Texas Panhandle Gas Co.* v. *Thompson, et al.* 12 Fed. Sup. 462. In their pleadings in this case (R. 50) appellants "admit that it was the purpose and intent of H. B. 266 to prevent complainant (appellees), and those similarly situated, from supplying their entire market requirements from their own wells."

The uncontradicted evidence shows that the development of the Panhandle field on a large scale began about the year 1925; that from that time enormous quantities of gas have been produced from oil wells; that in the beginning the gas was believed to have no substantial value and no steps were taken to conserve it; that huge quantities of gas were produced and wasted in the Borger area and in other areas in which oil was produced; that casinghead gas plants were introduced for the purpose of stripping gasoline

from this gas produced with the oil, whereupon producers yielded to the temptation to rip the casing in their oil wells in order to produce gas from the gas-bearing formations lying above the oil-bearing strata; that the only attempt on the part of the Commission to curtail the extravagant production of gas in the Panhandle field prior to December 30, 1932, was an order requiring the use of the Millerhead or some similar device to prevent unnecessary escape of gas to the air during the completion of oil wells; that no order was ever promulgated fixing a gas-oil ratio or otherwise curbing the waste of gas in connection with the production of oil until December 30, 1932, on which date an order was issued fixing a maximum gas-oil ratio of 25,000; that this order was never put into operation, but was suspended following the inauguration of the policy of the Commission of granting permits for the stripping of dry gas of its gasoline content and wasting the residue to the air; that the excessive production of gas in the oil fields soon caused the formation of low pressure areas in Borger and in other fields (R. 253-259). Even now there is no real effort to control the production of gas from oil wells. The Commission has issued an order calculated to lead to the impression that it is limiting the gas-oil ratio in the Panhandle to 10,000; but under the construction placed on this order by the Commission's representative in the Panhandle, any oil producer can produce as much gas as is being produced by the largest producer of gas who is producing under 10,000 cubic feet per barrel (R. 256); that is to say, the owner of a well with an allowable of 11.7 barrels of oil can produce 1,172,000 cubic feet of gas, regardless of whether it is necessary to produce that much or not, because it happens that the largest quantity of gas produced from an oil well with a gas-oil ratio of 10,000 is 1,172,000 cubic feet daily. This gesture at regulation of the gas-oil ratio permits the production from 329 oil wells in the Panhandle, which have gas-oil ratios between 10,000 and 100,000, of

329,000,000 cubic feet of gas daily in excess of the published limit of 10,000. An examination of the testimony of the witness Parker, who was for twenty-six years an employee of the Railroad Commission (R. 253) on this point discloses that the pretended effort of the Railroad Commission to reduce waste to the air through the regulation of the gas-oil ratio is a complete farce.[1] If the Railroad Commission were seriously undertaking to stop the wastage of natural gas in the Panhandle, it would be giving attention to this condition rather than spending its time theorizing concerning the possible reduction in the quantity of recoverable gas that might result from the production of the market requirements of the pipe lines from their own wells while other wells are shut down. The only gas-oil ratio regulation ever promulgated by the Commission prior to the enactment of House Bill 266 was an order dated December 30, 1932, which limited the gas-oil ratio to 25,000. That order was not enforced, because shortly after its adoption the Commission commenced, in February, to grant permits to strip gas (R. 255). At that time the practice of stripping gas was positively forbidden by the Texas statutes as construed by the courts. *Henderson* v. *Railroad Commission,* 56 Fed. (2) 218; *Canadian River Gas Co.* v. *Terrel, supra.*

In the case last cited the court held that the so-called market demand statute involved in that case should be construed in connection with and as a part of the statutes relating to waste, clearly implying that if it were necessary to curtail production for the prevention of waste, the Commission would have the power to limit production. That the Commission did not believe that orders similar to those here under attack would prevent underground waste of gas is made clear by the circumstance to which the court in its opinion calls attention; that the defendants admitted in their answers in two of the cases decided at the same time

1. By gas-oil ratio is meant the quantity of gas in cubic feet produced from an oil well with each barrel of oil.

that there was no actual physical waste caused by the operations of plaintiffs (the pipe lines), except to the extent that the operations of plaintiffs and other companies similarly situated affected the rights and conduct of other operators in the field. Appellants admit in their brief (pp. 30-39) that other statutes existing at the time of the passage of House Bill 266 were ample to remedy the problem of underground waste. If the appellants believed that underground waste of any character was occurring in the Panhandle which could be corrected by the limitation of production, then why did they fail to issue these curtailment orders, which, they now say, were intended to prevent underground waste, until after the enactment of the present statute? There is but one answer to this question. With the full facts before them, appellants knew that there was no such underground waste, and their contention now that they are basing these orders upon any such consideration is a mere afterthought—a pretense through which they seek to sustain these orders, which they promulgated as a means of coercing appellees and those similarly situated to give up to others substantial interests in their marketing contracts and in their pipe line facilities.

In the case of *Danciger Oil & Ref. Co.* v. *Smith*, 4 Fed. Sup. 236, decided about the same time, a great mass of uncontradicted proof was introduced showing the disastrous results of dissipation and wastage of gas on the ultimate production of oil by reason of the formation of low pressure areas as a result of the unbridled dissipation of gas produced from oil wells and the operations of those engaged in stripping gas and wasting the residue to the air. These low pressure areas had already been formed as a result of this excessive production, and water had shown up in many of the oil wells in those low pressure areas long before the two cases last cited were decided. The Commission knew of the existence of these low pressure areas and of the

presence of water. They knew also that the formation of these low pressure areas had already started the migration of gas from the areas of higher pressure (R. 258, 360, 361). If the members of the Railroad Commission believed that the creation of these low pressure areas would result in the dissipation of reservoir energy contained in the gas under pressure, or would increase the water hazard, thus causing waste, and that orders curtailing the production of gas to the market demand would prevent this waste, or even tend to prevent it, why did they not prove it in the gas cases heretofore decided, instead of admitting in those cases that there was no gas waste, and why, following the decision, did they not exercise the power, which the court in the *Canadian River* case held they possessed, to curtail production under the market demand law as a means of preventing waste? There is but one answer to this question. The Commission knew that no underground waste existed in the Panhandle which would be corrected by the promulgation and enforcement of such curtailment orders; and in the light of the court's holding that they could not curtail and prorate the production of gas as a means of forcing the pipe lines to divide their markets and marketing facilities, the Commission regarded themselves as without authority to promulgate orders prorating the production of gas.

Further proof of the underlying purpose of the Commission in promulgating the orders now under attack is found in the circumstance that in the report to the Senate Investigating Committee (R. 393) by the members of the Commission, not a word was said about the waste of gas through dissipation of reservoir energy, through the coning or channeling of water, or any other form of underground waste. It is clear from this report that the members of the Commission were concerned only about finding markets for certain producers, whom they call "independents" and "little men," and in castigating the pipe lines because they had

resisted in the courts the efforts of the Commission to coerce them into buying gas from all producers. Notwithstanding the facts to the contrary, they declare the pipe lines to be monopolies and assert that they are draining the gas from smaller owners. They mention the enormous waste of gas by the strippers—not to condemn or deplore it; but they actually defend it on the ground, among other grounds, that science will probably find a substitute for gas before the present market supply be exhausted and that gas will then have no economic value (R. 398). The pretense now that the Commission is concerned over the waste of gas is nothing short of mockery!

It will be of interest to the Court to examine also appellants' Exhibit No. 77 (R. 387), which is a preliminary report of the Senate Investigating Committee of the 43rd Legislature. After hearing evidence for several days concerning the situation in the Panhandle, this Committee made its report, with recommendations, in which not a word was said about wastage of gas through water encroachment, loss of reservoir energy, or other form of underground waste, but in which the wastage of gas by strippers was deplored. The recommendations were that certain tax levies be made and that statutes be enacted that would force a division of markets among all the owners of gas wells in the field (R. 390-391). In that part of the report of the Committee on Interstate and Foreign Commerce of the national House of Representatives introduced by appellants (R. 400), including the testimony of H. M. Stalcup introduced before that Committee, not a word is said about any form of underground waste. The waste deplored was the popping off of residue gas from the stripping plants, which at that time had attained proportions of more than one billion cubic feet of gas daily.

Appellants introduced a statement by Harold L. Ickes, Secretary of the Interior, contained in an address to the

American Petroleum Institute at Dallas, in which he deplored the "devilish" waste of natural gas going on in the Texas Panhandle. An examination of this statement (R. 420-422) shows that no reference was made to underground waste, but that he was referring to the popping off of approximately one billion cubic feet of natural gas daily by the stripping plants.

It is true that the witness Cottingham, an engineer in the employ of the Commission, testified that the Commission did not commence a study of the water problem until December, 1935. What additional facts were made known to the Commission as a result of this "study" of the water situation in the Panhandle during the past few months (R. 309)? As already stated, the witnesses Parker and Griffin, former employees of the Commission, testified in substance that the Commission knew of the existence and extent of water that had appeared in the Panhandle over a long period of time. There is no evidence that the Commission learned a single fact concerning the presence of water that its members did not know long prior to the commencement of such "study." The truth is that the Commission, after the hearing of these cases on application for interlocutory injunction, sought, from facts which everybody concerned had known for many years, to make deductions to the effect that waste would ultimately result from unequal withdrawals of gas and the creation of low pressure areas and attendant migration of gas to those areas from areas of higher pressure. In the orders under attack the Commission undertook in great detail to justify such deductions and conclusions; but it is so palpably clear that these efforts on the part of the Commission are the result of an afterthought that such deductions and conclusions are entitled to no serious consideration. Starting out with the order of July 20th, the Commission evidently thought it had the power to curtail and distribute the production of

gas in the Panhandle by limiting the quantity produced to the private markets of the pipe line companies, without regard to waste, and they gave little or no consideration to the subject of wastage; but when the trial court rendered its opinion on the application for interlocutory injunction, appellants found themselves in the position where they could not sustain their orders except on considerations of preventing waste. Thereupon they instituted a serious "study" of the water problem and the results of migration of gas through the producing formations in an effort to discover some basis for the orders which were promulgated, and which are promulgated, for the real purpose of forcing the appellees and others similarly situated to divide their private marketing contracts and give up a part of their transportation facilities to those whom the appellants composing the Commission have made the special objects of their concern. The overwhelming evidence amply sustains appellees' position on this point and fully justified the trial court in finding and holding that, in the promulgation of the orders attacked, the members of the Commission were actuated by the real purpose and design, as manifest from the necessary operation and effect of the orders and from the history of the controversy leading up to the orders, of confiscating and turning over to others a substantial part of appellees' markets and the use of appellees' pipe line facilities, provided by them for the transportation of their own gas to these private markets.

Notwithstanding the claim of the Commission that one of its purposes in the promulgation of these orders is to prevent the underground waste of natural gas, it is clear from the evidence and the findings of the trial court that such is not their purpose; but that they are still proceeding with an eye single to the accomplishment of a forbidden purpose, that of appropriating a portion of appellees' markets and marketing facilities for the benefit of private interests who

have not had the foresight and initiative to provide themselves with markets and marketing facilities. *Yick Wo* v. *Hopkins*, 118 U. S. 356; 30 L. E. 220.

The orders will not be held valid even if the court should find that incidentally they may tend to prevent waste of gas, if they are based primarily on authority assumed by the Commission to coerce appellees and others similarly situated into a division of their markets and facilities with others. *A. T. & S. F. Ry. Co.* v. *Interstate Commerce Commission*, 190 Fed. 591.

The label placed upon these orders by the Commission and the declarations contained in the orders themselves that they were issued for the purpose of preventing waste are not binding on the courts, who may and must inquire into the real, as distinguished from the ostensible, purpose of the statute and determine the fact whether the orders in their scope and effect depart from the declared design and contravene the fundamental and supreme law of the land. *Mugler* v. *Kansas*, 123 U. S. 623, 31 L. E. 205; *Coulter* v. *Pool*, 201 Pac. 120.

If the Commission, in the exercise of its powers or under the pretext of executing its powers, issues orders for the accomplishment of objects beyond its powers, it becomes the duty of the court, however painful, to say that the orders are invalid and not enforcible. *McCullough* v. *Maryland*, 4 Wheat. 316, 423.

Any order of the Commission ostensibly issued under power granted by the statute, not naturally and reasonably adapted to the effective exercise of such power but solely to the achievement of something plainly beyond the power, cannot be enforced. *Linder* v. *United States*, 268 U. S. 5, 17, 69 L. E. 819; *United States* v. *Butler*, 80 L. Ed. 287, decided January 6, 1936.

However desirable the ends actually sought to be accom-

plished by the Commission as viewed from their standpoint, if the means it adopts to accomplish these ends exceed the limitations upon the power of the Commission and conflict with the rights assured to appellees under the Constitution, the orders must fall. *Meyer* v. *Nebraska,* 262 U. S. 390; 67 L. E. 1042.

Although the orders may have been couched in a form which would cause them, superficially considered, to appear to be but the exercise of an authority to prevent waste, yet if it plainly results from the record that the orders were not in the exercise of such authority but were based on the assumption by that body of a power not conferred by law, the mere form given the orders does not relieve the courts from the duty of reviewing and correcting the abuse of power. *S. P. Co.* v. *Interstate Commerce Commission,* 219 U. S. 432; 55 L. E. 282.

The Commission is without power, "under the thinly veiled pretense of going about to prevent physical waste" in co-operation with persons interested in finding a market outlet for their natural gas, to promulgate and enforce orders operating to take from appellees their property and the use of their property in violation of the Constitution. *McMillen* v. *Railroad Commission,* 51 Fed. (2) 400, 404; *Peoples Pet. Prod.* v. *Smith,* 1 Fed. Sup. 361.

In determining the real object and design underlying the orders, the Court will look to the necessary operation and effect of the orders rather than to the declarations contained in the body of the orders. *Texoma Natural Gas Company* v. *Terrell, supra; Peoples Pet. Prod.* v. *Smith, supra.* It will look also to the history of the controversy given in the reports of decided cases involving the same general problem. *Peoples Pet. Prod.* v. *Smith, supra.* It will look also to the history of these orders and their predecessors dealing with the same subject, and to the history of the whole problem with which they deal and to which the

orders may be rationally supposed to bear some direct relationship, the evils intended to be remedied, and the good to be accomplished. *Grasso* v. *Cannon Ball Motor Fgt. Lines* (Tex. Sup.) 81 S. W. (2) 482, quoting with approval from *Travelers' Ins. Co.* v. *Marshall* (Tex. Sup.), 76 S. W. (2) 1007, 1012, and citing Story on the Constitution, and other authorities.

2. APPELLEES AND THOSE SIMILARLY SITUATED HAVE NEITHER COMMITTED NOR CAUSED WASTE.

3. THE STATUTE, AS CONSTRUED BY APPELLANTS, AND THE ORDER UNDER ATTACK HAVE NO REASONABLE RELATION TO THE PREVENTION OF WASTE.

4. THE STATUTE, AS CONSTRUED BY APPELLANTS, AND THE ORDERS UNDER ATTACK TRANSCEND PUBLIC NECESSITY IN THAT THEY IMPOSE BURDENS UPON APPELLEES AND THOSE SIMILARLY SITUATED GREATLY OVERBALANCING ANY CLAIMED PUBLIC BENEFIT, AND ARE, THEREFORE, ARBITRARY, UNREASONABLE AND CONFISCATORY AS APPLIED TO APPELLEES AND THOSE SIMILARLY SITUATED.

The facts to which these points apply are identical or so closely related that, in the interest of brevity and to avoid repetition, we will consider them together. In considering these points we submit that the Court should give great weight to the admissions of appellants and the findings of the courts in the cases already decided, to which we have called attention. After admitting over and over again that the operations of the pipe lines caused no waste, and after leaving unchallenged the findings of the court in former cases that appellees' properties were being operated in a wise, a prudent and a skilful manner and that no waste was being committed or would be committed through the operation of appellees' wells and the wells of those similarly situated, appellants ought not to be heard to say in this case that appellees and those similarly situated are now committing or causing waste. The operations of appellees

and those similarly situated are in no sense different from those under scrutiny at the time the three cases heretofore submitted to the same trial court were tried. If no waste was resulting from the operations of the pipe lines at the time those cases were tried, no waste is occurring now.

The trial court found that there is no hydraulic drive exerted by the water found below the oil and gas in the same formations (R. 171); that this condition renders the Panhandle field free of hazards of water coning, water channeling and the trapping off by water of oil and gas as the result of too rapid production of gas (R. 172); that the only damage that has occurred from the encroachment of water has been that caused from local saturation of formations originally containing oil or gas by water that has come into the bottom of the well and risen in the well bore due to mechanical errors and defects in the drilling, completion and operation of the wells (R. 172); that the wells connected to pipe lines in both the East Panhandle field (R. 179) and West Panhandle field (R. 181) are scattered and distributed throughout practically the full length of the field, and that the wells not connected to pipe lines in the same field are similarly distributed, though often in more concentrated areas; that the fact that 105 wells in the East Panhandle field not connected to pipe lines have been produced at a much higher rate than have the wells connected to pipe lines and that 16 wells in that field have never been produced has caused no coning or channeling of water into the formations saturated with oil or gas, or the trapping off by water of recoverable oil or gas, or the underground waste of oil or gas or reservoir energy, or reduction in the quantity of recoverable gas (R. 179); that similar conditions in the West Panhandle field likewise have caused no coning or channeling of water into the formations saturated with oil or gas or the trapping off by water of recoverable oil or gas or underground waste of oil, gas or

reservoir energy, and that the quantity of gas ultimately recoverable has not been reduced (R. 181); that the owners of wells connected to pipe lines, including appellees, have always produced their wells in a prudent and skilful manner and in accordance with the most approved methods of production, without committing or causing physical waste; that at the time of the trial, which was mid-winter, appellees were producing their wells at the rate of about 10 per cent of their daily potential capacity; but that the average of the pipe lines for the year was substantially less (R. 180); that the production from their own wells by appellees and other pipe lines of the quantity of gas required from time to time to fulfill their marketing contracts and requirements will cause no coning or channeling of water, no trapping off by water of recoverable oil or gas, no underground waste of oil or gas or reservoir energy, or reduction of total quantity of recoverable gas from the field, even though the other wells in the sweet gas area of the West Panhandle field be produced at a much greater rate or be not produced (R. 181); that before House Bill 266 went into effect, grossly wasteful practices in the production of natural gas in the Panhandle were occurring, most of which waste was due to the extravagant production of natural gas from oil wells and to the production of gas from gas wells and processing same for the extraction of a very small quantity of natural gasoline and popping or wasting to the air the residue gas, constituting 97 per cent of its fuel value; that the production of gas from oil wells has been practically without restriction; that the production of gas by those who were stripping it has been at a tremendously greater rate than the production of gas from wells connected to pipe lines; that no evidence was offered—indeed, it was not even seriously claimed—that anything appellees had done or contemplated doing has in the slightest degree contributed or will contribute to waste (R. 181-2).

In its conclusions of law the trial court held as a matter of law that nothing appellees had done or contemplated doing has in the slightest degree contributed or will contribute (to) waste as defined by the statute, and that, since the restriction of appellee's production to a quantity below their absolute needs in the fulfillment of their market requirements was not in the slightest degree related to the prevention of waste, the orders attacked cannot be sustained as waste measures (R. 184); that the orders under attack transcend public necessity and are confiscatory as applied to appellees (R. 184).

Near the top of page 5 of the order of December 10th (R. 483), which by express provision of the order of December 18th (R. 497) is made the basic order for the January allowable, the Commission undertook to enumerate the conditions which they assert will result in waste. These conditions they state are water channeling and coning, loss of energy by permitting unnecessary sub-surface expansion of gas, dissipation of gas energy in areas adjacent to oil-bearing sands, and failure to recover the greatest ultimate quantity of gas.

We point out in the beginning that there is little variance in the basic physical facts presented to the Court by the opposing parties. The contentions are over the deductions or conclusions to be derived from the basic facts, on which all are in substantial agreement. Appellees do not deny the existence of low pressure areas. In fact, they made more convincing proof of the presence of these areas than did appellants (Original Exhibits Nos. 5 and 23, Exhibit No. 3, R. 439-458, Exhibit No. 16, R. 458-475, Exhibit 24, R. 500-532). Appellees showed by undisputed testimony that some of these low pressure areas are the direct result of the wasteful and unnecessary production of gas in connection with the operation of oil wells, and pointed out the

dereliction of the Commission in its duty to curb and regulate the production of gas in the oil fields through the promulgation and enforcement of proper gas-oil ratios (R. 254-259). By the same witness appellees pointed out that the other low pressure areas resulted from stripping operations commenced under permits granted by the Commission and later sanctioned by Statute, expressly authorizing the strippers to produce at the rate of 25% of the open flow, notwithstanding the generally known fact that the pipe lines were producing an average of but a small fraction of that percentage. By voluminous testimony, pressure maps, tabulations and other exhibits, appellees have shown the disastrous results affecting the pipe lines and their properties, traceable to the enormous and wasteful production of gas from localized areas in the oil fields and in the vicinity of the stripping plants, which are scattered throughout the length of the field in and adjacent to the oil producing areas. It would require too much time to point out all the testimony in the record bearing on this situation; but the sum total of the testimony is fully reflected in Original Exhibits Nos. 5 and 23, prepared by the witnesses Peterson and Camp respectively, which show the prevalence, extent and location of these low pressure areas. A comparison of Exhibit No. 5 with Exhibit No. 6 will show the progressive spread of low pressure areas and the increase in the number of low pressure areas that resulted between the years 1932 and 1935, which are accounted for under the uncontradicted testimony by the practice of stripping gas and popping the residue to the air, which sprang up first under permits issued by the Railroad Commission and later under the statute erroneously referred to as the "sour gas law" as already stated (R. 255-6).

Appellees in their direct testimony met squarely the fact that water has appeared in many of the oil wells and in some of the gas wells located in the Panhandle. Full proof

concerning the presence of water and the extent of water was offered in the oral testimony of a number of their witnesses, including Hughes (R. 229-231), Camp (R. 242-244, Original Exhibit No. 25), Parker (R. 254), and Boatright (R. 260-265). This testimony and the evidence reflected by the maps and other exhibits above referred to are overwhelmingly to the effect that no underground wastage of gas occurs, has occurred or will occur as a result of the presence of water or as a result of the migration of gas—certainly not as a result of the operations of appellees and other pipe lines similarly situated, to whose operations neither the presence of water nor the creation of conditions causing the migration of gas can in any way be attributed. We call particular attention to the undisputed testimony that none of the wells of appellee Consolidated Gas Utilities Corporation has ever shown water, although they have been producing since October 10th, 1928 (R. 244). There is no evidence that any well of appellee Texoma Natural Gas Company has ever shown water. In the list of the wells in the West Panhandle field showing water, none of those owned by Texoma is shown (R. 229-231). The witness Hughes testified without contradiction that the fourteen wells which he found to be producing water in substantial quantities had not been heavy producers of gas; that he had examined the records of the Commission to ascertain the twenty largest producers of gas in the field; that he found wells in the field each of which had produced more than ten billion cubic feet of gas, a much greater quantity than the average of the 14 wells above mentioned; that there was no notation of any water or moisture content on the gas well test tickets for these twenty wells, on which there were test tickets for all except one (R. 237).

The witnesses Hughes (R. 232-3, 235), Camp (R. 242-5), Parker (R. 254), Boatright (R. 260-262), and Gill (R. 283-4) all testified that in their opinion the Panhandle field is not

under a hydrostatic or water drive; that while it is underlaid with water extending up the producing formations approximately to sea level (refer to Original Exhibit 15), and the source of this water is probably formations extending to outcroppings in the Wichita Mountains in the State of Oklahoma, which accounted for the original rock pressure of approximately 430 lbs., the resistance of the formations between the source of the water and the Panhandle oil and gas field is such that the coming in of the water is so retarded that it exercises no driving force or repressuring influence in the Panhandle reservoir.

In their brief (pp. 191-193) appellants seek to minimize the force of this testimony by pointing out the definitions given by some of appellees' witnesses of the meaning of the terms "water drive," "hydrostatic drive" and "hydraulic drive," but a reading of the testimony of these witnesses will disclose that in a very plausible and convincing manner they demonstrated that the inflow of water to replace oil and gas removed from the producing formations in the Panhandle field is at so slow a rate as that it is impossible for the production of gas at the rates appellees' wells are produced to cause any coning or channeling of water or trapping off of oil and gas by the intrusion of water.

The presence of water in many oil wells and in some gas wells is clearly accounted for. The witnesses Hughes (R. 229-231), Camp (R. 243-244, Camp's map, Original Exhibit No. 25), and Boatright (R. 260-265, 272-274) all testified that numerous wells in the Panhandle oil field and many wells in the gas producing areas were drilled down to sea level and on into water. In that connection each testified that in the early history of the field, while the pressure was still high, the water would rise in the well bore to a height of approximately 1000 feet above sea level. A column of water 1000 feet high weighs approximately 430 lbs. to the

square inch. Appellants seized upon this circumstance as indicating that the water rises in the well bore because it is seeking its level in the outcroppings of the Wichita Mountains approximately 1000 feet above sea level, which all of the witnesses agreed is the probable source of the water that has found its way into the Panhandle gas field (R. 187-191); but the witnesses Hughes (R. 232-233) and Boatright (R. 261) testified without contradiction that the water will not rise to a level of 1000 feet in the Panhandle after the pressures around the well bore have been reduced, as is the case in the Borger field, but that the column of water will stand at varying levels from 1000 feet down to two or three hundred feet, as the pressure in the areas surrounding the well decreases. If the water had risen 1000 feet in seeking its level, as a result of a hydrostatic drive, while the pressures were 430 lbs., why would it not continue to rise to a height of 1000 feet when the pressures were reduced? In either event the back pressure exerted by the atmosphere down the well bore is exactly the same; and if water would rise to a height of 1000 feet as a result of a water drive enabling it to immediately find its level, that condition could not be changed by the circumstance that the pressure exerted by the gas around the well has been greatly reduced through production.

The explanation of appellees' experts is convincing and without factual contradiction. The witness Boatright brought into court a simple mechanical device (see Original Exhibit 32(A)) illustrating the effect of the pressure of gas upon the surface of water in causing it to rise against atmospheric pressure in an open tube comparable to a well bore. His demonstration with this device is set out in his testimony (R. 262-3, 271-2). There is no answer to the position of this witness and the other witnesses who corroborated him that the rise of water in a well bore to a height of 1000 feet while the pressures around the well were

430 lbs., and to a reduced height as the pressures around the well receded, is fully accounted for by the pressure exerted by the gas upon the surface of the water in the formations. It is not necessary to assume that a hydrostatic or water drive from the original source of the water must exist in order to account for this behavior of the water in drilling to depths below the top of the water level; but, for the purposes of the case, and without conceding that the Panhandle field was under a water drive, the witnesses Hughes (R. 232-237) and Boatright (R. 264-5, 280) testified that in any event, with the abnormally low reservoir pressure in that field, there was no danger of coning or channeling of water. In that connection they explained the presence of water in the Borger field by the circumstance that numerous wells in that field had been drilled into water and in only 40% of the wells were they able successfully to plug back the water. The witness Boatright also called attention to the deterioration of the cement plug when in contact with sulphurous fluids, so that in many instances when the water was successfully plugged back, through the deterioration of the cement plug the water was afterwards admitted. Of course, where the water was rising through numerous well bores up to and above the level of the producing formations, this water would gradually infiltrate out through the producing formations and find its way to the well bores of wells not originally drilled to the water level.

The witnesses were all agreed that by reason of the existence of impervious formations immediately below the well bores in the gas producing areas, there could be no coning of water into the bottom of the well from below. Even appellants' witness Cottingham, whose testimony was adopted by their witness Griffin, on cross-examination admitted this fact (R. 314). He accounted for the presence of water in two wells then under discussion on the theory

that it had been channeled into the well bore upstructure through the gas and oil producing formations from water lying six miles down structure in the particular wells in which these "sprays" of water were occurring (R. 314, see also Exhibit 15). He also stated that there were other gas wells between these two wells and the water level which might, if tested, show some water; but he did not state to the court that they did show water. The exhibits before the Court (R. 447) show that one of these wells has a rock pressure of 358 lbs., and that the other has a rock pressure of 347 lbs., against the original rock pressure of 430 lbs. The Court needs no proof, though the record reflects abundant proof, that water cannot be channeled up structure from an area of low pressure to an area of high pressure. In order for channeling to occur as claimed by the witness Cottingham, it would be necessary that these wells be produced at such enormous rates that a low pressure area would result from such production. The record is to the contrary.

The testimony to which we have referred, and other testimony introduced in the same connection and found at substantially the same places in the record, shows that in practically every instance where water has been found in a gas well, such well had been originally drilled as an oil well to the water level or below, or that it was located in immediate proximity to a well that had been drilled to the water level or below. In all other instances the quantity of water showing was inconsequential and could be accounted for by condensation of water vapors in association with the gas or by infiltrated waters coming down the well bore from higher water producing formations.

Appellants rely largely on the testimony of the witness Fowlston as supporting their contention on this point. The testimony on which they rely is set out at pages 194-

196 of their brief. His testimony was confined to the fact that water had appeared in two wells belonging to his employer, which he says were at the time he testified "producing a heavy spray of water when the wells were opened," and that the open flow of the wells was approximately half of what it originally was, and that these wells were completed about 150 feet above sea level. He does not undertake to say that the water was coned up at the bottom of the wells or that it was channeled up structure from the water level. He was content with the general statement that he could account for the presence of the water only by the heavy withdrawals of gas in the areas where the wells are located. He admitted he did not know why the water had appeared. He concluded his statement with the observation that he thought if conditions remained as they were at the time of the trial, with unregulated withdrawals over much of the structure, which has resulted in localized low pressure areas, the water would get worse. There is nothing in this testimony that is not entirely consistent with the unequivocal statements of the witnesses Hughes and Boatright above referred to, to the effect that in all instances where water has appeared in a gas well, it has been brought into the producing formation along the well bore of some neighboring well which has been drilled into the water. The witness admitted on cross examination that he had joined in a report by a committee of engineers during the month of August, 1934 to the effect that there is evidence that no water drive is present as a motivating force in the ultimate recovery of either gas or oil (R. 318-319). The fact that the open flow of the two wells about which the witness testified is now only half of the original open flow is no evidence of damage by water. The reduction in open flow is easily accounted for by the circumstance that these wells are in a low pressure area where there has been a heavy produc-

tion of natural gas through wells connected to the Cargray stripping plant (R. 316). The witness did not say that any water intrusion or water hazard would result from the production of gas at the rates at which appellees and other pipe lines produce their wells. In his final observation he was insisting that the water conditions would get worse if conditions remained as they were at the time of the trial. The context of his testimony (R. 315-319) clearly shows this. The uncontradicted testimony shows that at the time of the trial the stripping operations were running at full blast (R. 228-229). Tremendous quantities of gas were being produced from concentrated areas for the operation of stripping plants and from the oil producing areas, which for years had been characterized by extremely low pressures. The spray of water referred to by this witness must not have been very serious; for in his testimony quoted by appellants (R. 316) he stated that when a well began to show water, his practice was to go out and "blow" the well and try to clear it up without going to anybody about it, and that "we just go and do it, we make no report to the Commission about it."

Only by the witness Dunn did appellants seriously attempt to show that any increased ultimate recovery of gas would result from the production of gas from all wells capable of producing gas rather than from the wells belonging to the pipe lines, which own the private contracts constituting the markets for such gas. Dunn's testimony is, in substance, stated in the neatly prepared booklet offered in evidence by appellants (Original Exhibit No. 70). It is a statement of certain highly theoretical conclusions based on conditions which have resulted, not from operations of the pipe lines, but from the wasteful operations of others, which the orders under attack clearly would not correct. In this booklet the witness exhibits a number of figures and cuts, including that shown on page 203 of ap-

pellants' brief. The figures and comment in the booklet and the testimony quoted by appellants in their brief would be highly misleading but for the fact that, on cross examination, the witness admitted that the gradients between the abandonment pressure at the well and that out in the reservoir from the well could not be stated with any degree of definiteness, and that the shaded portions of his figures were not intended to portray the quantity of gas that would be left in the reservoir at the time of abandonment (R. 347-8). He assumes that at the time the field reaches abandonment pressures, there will be large undeveloped areas. As a matter of fact, the undeveloped areas are largely owned by the pipe lines (See Original Exhibit No. 4), which acquired them as reserves and have held them through the payment of rentals with a view of developing them as additional gas is needed to supply their markets (R. 210). Under the terms of the leases covering these lands, it will be necessary to drill many wells on the undeveloped portions owned by the pipe lines in order to prevent a termination of the leasehold interest at the end of the primary term (R. 210).

On cross examination he admitted that there is practically the same distribution over the entire reservoir of wells connected to pipe lines as of wells not connected to pipe lines; that in a regional sense, there is the same general distribution of pipe line wells from one end of the reservoir to the other as there is of wells not connected to pipe lines (R. 351-2). Notwithstanding this admission, however, the witness held to his conclusion already stated under direct examination that more gas would be recovered from the reservoir if the pipe lines were required to cut down the production from their own wells, thus widely distributed, and take part of their market requirements from the wells of others, which are distributed over the same general area (R. 352). The witness utterly failed,

however, to produce facts which would substantiate that conclusion, and no other witness for appellants produced any such facts. The conclusion reached by this witness and by the appellants' other witnesses who adopted this conclusion will not bear analysis under the facts overwhelmingly established by the testimony of the witnesses Boatright (R. 266-271, 280-281) and Gill (R. 284-290, 293) and the exhibits illustrating the testimony of these witnesses (See Original Exhibits Nos. 32, 33, 34, 35, 36, 37, 38 and 39, and also Original Exhibits Nos. 5 and 23, prepared by Peterson and Camp respectively).

Space forbids our undertaking to quote this testimony, which is rather technical and in considerable detail. Boatright testified that it is a characteristic of gas that it will expand and fill the container, and that any place in the container that a sample be taken, the gas will be uniform; that the time required for the distribution depends on the resistance within the container; that the expansion exerts a motive force called energy (R. 266). By Original Exhibit No. 36 and his explanatory statements (R. 268-271) he demonstrated that the only way to remove the reservoir energy is to remove the gas; that when a given quantity of gas is removed from the reservoir, the same quantity of energy will remain, when the equilibrium is restored, regardless of whether the gas be taken from one well or fifty wells. He then testified that, disregarding the time element, as much gas could be produced from a few wells as from many wells, though, of course, more gas could be produced from the greater number of wells within a given time (R. 282). Gill corroborated this testimony (R. 284, 287, 290). The latter further testified:

> "As to whether or not there is any difference in the ultimate recovery of gas by virtue of producing that gas from wells connected to Texoma's pipe line or Consolidated Gas Utilities Corporation's than from distributing the production over a large number of

gas wells by making connections with wells not now connected to those lines, I don't believe that any of the changes in production from this well (referring to exhibit) or that well (referring to exhibit), or from any other example from one well to thirteen wells, would make the slightest difference in the total amount of gas recovered."

Particular attention is called to the statements in the testimony above referred to of the witnesses Boatright and Gill, pointing out that the migration or flow of gas is not necessarily a characteristic of gas under pressure, but that the migration or movement is due to a differential in pressure; that however high the pressure, there will be no migration unless there be an area of low pressure in the same reservoir; that gas will move from an area with a pressure of 25 lbs. above atmosphere into a well bore at atmospheric pressure just as certainly as will gas flow from an area of 435 lbs. above atmosphere to an area 405 lbs. above atmosphere. In other words, when there is a differential between the pressure at the bottom of the well and in the formations out through the reservoir from such well, there will be a flow of gas to the well, and according to the opinion of all the witnesses who testified on that point, the field will not be abandoned until its mean, or average, pressure has been reduced to 25 lbs. What possible difference could there be in the quantity of gas remaining in the area where appellees' well is situated and a neighboring area where some well not now connected to a pipe line is situated, if, at the time of abandonment both areas have a pressure of 25 lbs., than if the area in which the pipe line well is situated has a pressure of zero and that where the other well is situated has a pressure of 50 lbs.?

Appellants in their brief take appellees' witnesses, including Boatright, to task for the reason that they qualified their testimony that the same quantity of gas could be

recovered from the wells owned by the pipe lines as could be recovered from all wells now in the field, including those not connected to the pipe lines, by the statement "disregarding the element of time." The context of the testimony shows conclusively that, as applied to conditions prevailing in the Panhandle, this expression, "disregarding the element of time," meant no more and no less than that within a given number of days or within any stated time, more gas could be produced from all the wells in the field produced to capacity than if only a part of the wells were produced to capacity. If appellees own twelve wells with a combined producing capacity of 50,000,000 cubic feet daily, they could not produce 100,000,000 cubic feet of gas from these wells as quickly as they could produce it from 24 wells with a combined producing capacity of 100,000,000 cubic feet daily; but by operating the twelve wells two days they will get their 100,000,000 cubic feet just as certainly as they could get it from the 24 wells in one day. As a practical matter, when the producing capacity of appellees' wells now producing becomes so reduced that they cannot supply their market requirements from these wells, they will drill additional wells on their undeveloped leases and keep the producing capacity of their wells up to a level adequate to meet their market requirements as of any given time. That was their very purpose in acquiring these great reserves, which involve heavy investments. According to the testimony of appellants' witness Dunn, this additional development will be highly desirable. An examination of Original Exhibits Nos. 4, 5, 22 and 23 will show that these reserves of the pipe lines are largely in the undeveloped portions of the field, while the wells already drilled but not now connected to pipe lines are in the vicinity of the highly developed area along the northeast side of the reservoir. Under the very contentions of appellants, based on the testimony

of their witness Dunn, it is highly more desirable that additional wells be drilled on the reserves of the pipe lines rather than that the pipe lines be required to take a portion of their requirements from wells drilled in or in close proximity to the areas which have already been heavily produced.

The whole theory of the witness Dunn is exploded by the circumstance that the wells belonging to the pipe lines are distributed from one end of the reservoir to the other, and that the wells not connected to the pipe lines are distributed over substantially the same area, with the exception that the latter lie between the wells of the pipe lines and the intensely produced areas embracing the oil fields along the northeast side of the reservoir (Original Exhibits Nos. 4, 5, 22 and 23). In a gas field 125 miles long and an average of 15 miles wide, there is no point in taking two wells and theorizing concerning pressure gradients that would obtain at the point of abandonment when one of these wells was produced and the other not produced and when both were produced, as did the witness Dunn in his explanation of the figure shown at page 203 of appellants' brief. The Court will look to the whole picture, as did the trial court. The simple question involved is whether, in the light of the whole picture, taking into account the circumstance that the pipe lines have acquired large reserves which they expect to develop and will have to develop under the terms of their lease contracts, as much gas will be recovered from the whole reservoir, through the wells drilled and to be drilled by the pipe line, as would be recovered if they were required to connect their pipe lines with the wells of other parties distributed over the same general area and to divide their market outlets with the owners of these other wells. The forcing of the pipe lines to connect with the wells of others would, of course, materially retard the development of the former's reserves. Can it be said that,

from a standpoint of ultimate recovery, more gas would be recovered by producing the combined private market requirements of the pipe lines from all the wells now in the field, leaving the reserves of the pipe lines undeveloped, than would be recovered if the pipe lines develop their own reserves as it shall become necessary to meet these market requirements, leaving the owners of other wells to develop their own market outlets and their own facilities for marketing their gas? The maps above referred to clearly show to the contrary.

The trial court saw the fallacy of Dunn's testimony and the presiding judge himself interrogated the witness on this point. (R. 351-356). As a result of this interrogation the witness finally admitted in substance what we have just stated. We quote:

> "Q. (The Court) Let me make clear what I am trying to say. I can understand that the wide distribution of wells is exactly in line with what you are talking about, but if there are 14 wells or 28 wells within a defined area, a closely defined area, as to the draining of the whole field would it make any practical difference in the ultimate recovery whether you took that out of the 14 or out of the 28?
>
> A. It will not."

Without taking into account the additional wells that the pipe lines will certainly drill, this admission on the part of the witness Dunn, without regard to the overwhelming evidence to the same effect offered by appellees, was abundant testimony to sustain the finding of the trial court that the production from their own wells by appellees and other pipe lines of the quantity of gas required from time to time to fulfill their marketing contracts and requirements will cause no underground waste of oil, gas or reservoir energy or reduction in the total quantity of recoverable gas from the field. (R. 179, 181).

Even if Dunn's theory were not thoroughly discredited

by the facts above pointed out, his testimony is too general, too theoretical and too uncertain to justify the taking of appellees' markets and the use of their pipe line facilities and pass them on to others, without compensation, and forcing appellees to submit to the enormous losses in drainage which will result from the operation of the orders under attack. As said in *Peoples Pet. Prod.* v. *Smith, supra:*

> "Too little is definitely known about these theories, and there is too large a body of undisputed controlling physical facts, to permit opinion evidence to determine * * * the real and substantial rights in question."

Let us examine Original Exhibit 15, the cross section introduced in connection with the testimony of the witness Peterson. This exhibit depicts facts which appellants have not disputed and it fairly portrays the actual physical conditions as they exist in the Panhandle. Compare these facts with the opinions of the witness Dunn, to which we have referred. The difference in the character and value of the two types of evidence is concisely and aptly expressed by the trial court in its opinion, from which we quote:

> "On this hearing a vast amount of testimony was offered, illuminating the actual physical conditions in the entire field. A considerable part of it consisted of opinion evidence more or less expert; opinion evidence as to practical facts and conditions which could be checked and rechecked with the physical conditions observed in the field. This opinion evidence, in most particulars indeed as to the controlling, the real points in the case, was on the whole without conflict. There was in addition some opinion evidence offered in the case on the ultimate question tendered for trial and decision, that is, whether the orders bore any just or reasonable relation to the prevention of waste, in the sweet gas field. These opinions were of an order of proof having little if any probative force, because no more than speculation, surmise and conjecture, the opinion of witnesses on the ultimate fact for decision, a kind of evidence universally held insufficient to con-

stitute proof. *Miller* v. *United States*, 71 Fed. (2d) 361; *United States* v. *Spaulding*, 293 U. S. 498; *United States* v. *Bass*, 64 Fed. (2d) 467; *United States* v. *Sauls*, 65 Fed. (2d) 886; *United States* v. *Harris*, 79 Fed. (2d) 341; *Peoples Petroleum Producers* v. *Smith*, 1 Fed. Supp. 361."

Since no underground physical waste has occurred or will occur from appellees' producing from their own wells the gas necessary to perform their marketing contracts, as clearly appears from the evidence already discussed and from the findings of the court, it necessarily follows that the orders limiting the production from appellees' wells to a quantity less than that required to perform their marketing contracts, and requiring appellees to divide their contracts and pipe line facilities with the owners of other wells, have no reasonable relation to the prevention of waste. But even under appellants' theory, the testimony is overwhelming that these orders have no reasonable relation to the prevention of waste—indeed, that far from preventing waste, their necessary operation and effect would be affirmatively to cause waste. Appellant's theory is that the formation of low pressure areas creates danger of water intrusion, causes an unnecessary using up of reservoir energy, and would ultimately reduce the quantity of gas which can be recovered from the reservoir. The trial court found to the contrary and its findings are sustained by the overwhelming testimony, as above demonstrated. But, for the sake of argument, let us assume that some form of underground waste might result from the existence of areas of low pressure within the reservoir. What, if anything, would the enforcement of these orders accomplish toward preventing the formation of low pressure areas or correcting existing low pressure areas. Again it is necessary to refer to Original Exhibits Nos. 5 and 23, from which it appears at once that all along the northeast edge of the

field or reservoir the prevailing rock pressures are far below the pressures prevailing in other portions of the reservoir. These pressures graduate from 50 to 150 lbs. along the northeastern, or structurally low, portion of the field to the original pressure of 430 pounds along the southwestern, or structurally high, portion of the reservoir (R. 171). We quote from the trial court's findings of fact, which are supported by the uncontradicted testimony and which are not attacked:

> "Along the north and west sides of the western portion of the field gas is found to be contaminated with sulphur compounds and is known as 'sour' gas. To the south and east of the area producing sour gas, the gas is free of sulphur compounds and is known as 'sweet' gas. There is no physical barrier between those portions of the formations producing sweet gas and sour gas and there is free migration of gas from the sweet gas area to the sour gas area, and vice versa. The line of demarkation between the areas producing sweet and sour gas is known locally as the sour gas line.
>
> The entire reservoir embraces approximately 1,400,000 acres. The area producing free gas embraces approximately 1,174,000 acres, of which approximately 270,000 acres produces sour gas and approximately 904,000 acres produced sweet gas. By a north-south line in the so-called Lefors area in Eastern Gray County, the Railroad Commission has divided the reservoir into zones or fields, that lying to the east of the line being known as the East Panhandle field and that to the west as the West Panhandle field. The area producing free gas in the East Panhandle field embraces about 181,000 acres, and that producing free gas in the West Panhandle field about 993,000 acres. * * * The sweet gas area in the West Panhandle field, therefore, contains about 723,000 acres." (R. 170.)

In the order of December 18th, 1935, (R. 497) which is one of the orders here under attack, it is stated that the combined open flow capacities of the wells in the East Panhandle field is 6,938,160,000 cubic feet daily; that of the

wells in the West Panhandle sweet gas field is 8,324,321,000 cubic feet daily; and that in the sour gas field is 2,128,328,000 cubic feet per day. The allowable fixed by the order for the West Panhandle sweet gas field, which embraces 723,000 acres as above shown, is 608,552,000 cubic feet daily; that allowed the sour gas area, embracing 270,000 acres, is 520,496,000 cubic feet daily. It thus appears that under this order the wells in the sour gas area, the developed portion of which the Court will see at once from the exhibits above referred to lies in those areas of extremely low pressure along the northeast slope of the West Panhandle field (the trial court found the average pressure of sour gas wells to be 220 lbs. per square inch, R. 177), are allowed to produce at a rate of approximately 25% of the combined potential producing capacities of the wells therein situated, whereas the wells in the sweet gas area, with an average pressure of 364.5 lbs. per square inch, are permitted to produce only approximately 7% of their combined potential capacities. Appellants will answer, of course, that in the same order they found the market demand for sweet gas in the West Panhandle field to be only 608,552,000 cubic feet daily, while the market demand for sour gas was 520,496,000 cubic feet daily. But, under the express terms of the statute, the Commission is authorized and empowered to reduce the production to a point below the market demand, if necessary to prevent waste (appellant's brief, p. 254). No argument is necessary to show that the production of the sour gas wells already in low pressure areas at a rate almost four times as rapid as the production from the sweet gas wells in areas of relatively much higher pressure will actually increase the pressure differential between the sweet gas area and the sour gas area. The witness Carpenter testified to this effect (R. 248). Thus it appears that if there were any-

thing in the theory that the existence of low pressure areas would lead to underground waste of gas, the order under attack, in its necessary operation and effect, would actually cause waste and not prevent it.

Now let us examine the record as to the effect of these orders within the sweet gas area itself. We again quote from the findings of fact of the trial court (R. 176, 177):

> "On their reserves and leases the pipe lines have drilled 293 wells in the West Panhandle field. Those owning other leases in the West Panhandle field have drilled 180 wells producing sweet gas and 211 wells producing sour gas, or a total of 391 wells. The leases on which the wells owned by the pipe lines are located aggregate 523,063.97 acres, an average of about 1785 acres per well. From these developed leases they have produced a total of 529,545,454,000 cubic feet of gas, or an average of 1,157,000 cubic feet per acre. Complainant's 90 producing wells are located on developed leases aggregating 81,928.44 acres, an average of 911 acres for each well, and have produced a total of 98,-808,489,000 cubic feet, or an average of 1,312,000 cubic feet per acre. The 180 sweet gas wells in the West Panhandle field not connected to pipe lines are located on leases aggregating 30,096 acres, an average of 167 acres per well. These wells have produced a total of 418,652,466,000 cubic feet or an average of 13,900,000 cubic feet per acre. * * *
>
> The average rock pressure of the 293 sweet gas wells in the West Panhandle field owned by the pipe line companies, at the time of the last official test prior to the trial, was 364.5 lbs. per square inch; (that) of the 201 wells connected to pipe lines in the East Panhandle field 315 lbs. per square inch. The average rock pressure of complainant's 90 producing wells was 336.8 lbs. per square inch. That of the 180 sweet gas wells in the West Panhandle field not connected to the pipe lines was 233 lbs. per square inch. * * *
>
> The average for the 121 wells not connected to pipe lines (in the East Panhandle field) was 222 lbs. per square inch."

Thus it appears that the pressure differential between

the sweet gas wells connected to pipe lines in the West Panhandle field and the sweet gas wells not connected to pipe lines in that field is 131.5 lbs.; that the pressure differential between the sweet gas wells in the East Panhandle field connected to pipe lines and the sweet gas wells in that field not connected to pipe lines is 93 lbs. The pressure differential between the wells of appellee Texoma and the 180 wells in the West Panhandle field not connected to pipe lines is 103.8 lbs. The average rock pressure of the wells connected to pipe lines in the East Panhandle field is 305 lbs. The average rock pressure of appellee Consolidated's wells is 269 lbs. (R. 241). Thus it appears that there is a pressure differential between the average pressures of all wells connected to pipe lines in the East Panhandle field and those not so connected of 83 lbs., and a pressure differential between the average rock pressure of appellee Consolidated's wells and wells not connected to any pipe line of 47 lbs. Practically all of the sweet gas wells in both the West Panhandle field (R. 177) and the East Panhandle field (R. 179) lie between the wells of the pipe line companies and the low pressure areas resulting from oil field and stripping operations, or lie within such low pressure areas. It is obvious that the necessary effect and operation of the order, which requires that appellees and other pipe lines whose wells are in areas of substantially higher pressure curtail their production to a quantity less than that required to perform their marketing contracts, and make up the difference between the amount they are allowed to produce and the amount required to fulfill their marketing obligations from the wells of others, would be to keep the pressure differential between the wells of the pipe lines, including those of appellees, and the wells not connected to pipe lines at a higher level than would obtain if the pipe lines produce their full market requirements

from their own wells. The witness Carpenter also testified to this effect (R. 248). Thus it appears that, far from preventing waste, this requirement of the order would actually cause waste, if appellants' theory were correct.

The witness Carpenter testified that the result of this allocation would increase the pressure differentials and that in order to bring about a condition so that the pressures would be brought down uniformly, it would be necessary to take more of the gas from the south area and less from the north, that is, more from the higher area and less from the low (R. 248). This witness made a study of specific instances dealing with the allowables as between the sour and sweet gas areas. He chose wells located on opposite sides of the sour gas line from each other. A sweet gas well belonging to Texoma, with a potential of 12,950,000 cubic feet daily, located on a 640 acre lease, was allowed to produce 1,659,000 cubic feet daily, while a sour gas well, with a potential of 14,998,000 cubic feet daily, located on an 80 acre lease, was permitted to produce 3,747,000 cubic feet daily. Reducing these comparative allowables to an acre basis, the sweet gas well of Texoma was allowed to produce 2.6 thousand cubic feet per acre daily, and the sour gas well was permitted to produce 46.8 thousand cubic feet per acre daily. Other examples of the same character are set out by this witness (R. 249-250). Can it be said that such discrepancies in the quantities of gas which wells would be permitted to produce under the order would bring down the pressure uniformly or would tend to correct pressure differentials? The very orders under attack expressly sanction permit these discrepancies, yet we find appellants here contending that these orders ought to be upheld because they require "ratable production" from all the wells in the field.

We refer to one more illustration demonstrating the

point that the orders have no reasonable relation to the prevention of waste. Original Exhibit No. 8 portrays a portion of the field in eastern Carson and western Gray Counties known as the Cargray area. The 29 wells on the leases colored in light blue will be referred to as the Cargray wells. These leases aggregate about 4000 acres. The 29 wells of appellee Texoma in closest proximity to the Cargray wells are located on leases aggregating more than 15,000 acres. In addition to the leases on which these wells are located said appellee owns large reserves of acreage in the same vicinity on which no wells have been drilled. Prior to July 31, 1935, the 29 Cargray wells had produced 105,553,186,000 cubic feet, or about 23,000,000 cubic feet per acre. The 29 Texoma wells had produced 41,139,014,000 cubic feet, or about 2,660,000 cubic feet per acre (R. 222). Between July 31, 1935, and the time of the trial these Cargray wells had produced an additional 24,-260,243,000 cubic feet, an average of 5,440,000 cubic feet per acre, while the Texoma had continued to produce its 29 wells at the usual rate (R. 228). Thus, prior to the trial, the 4000 acres connected to the Cargray plant had produced a total of 28,440,000 cubic feet per acre, while the acreage on which Texoma's wells were located, without taking into account the undeveloped acreage in the same area, had produced only approximately 3,000,000 cubic feet per acre. Yet notwithstanding the fact that the Cargray wells had produced more than nine times as much per acre as had these neighboring Texoma wells, the order would require Texoma to cut down the production from its own wells and give a part of its private market contracts to the owners of these Cargray wells. It will be noted that the Cargray wells are so close together that, on the whole, they constitute a highly concentrated area, while the Texoma's wells are widely scattered over a large area. If the existence of low pressure areas would cause some

character of underground waste of gas, then the operation of these orders certainly has no reasonable relation to the prevention of waste; for it is manifest that the orders would require the taking of a much higher proportion of gas from the 4000 acres of the Cargray than from the surrounding areas owned by appellee Texoma and the other pipe lines.

The above illustrations by no means cover all of the testimony showing that if appellants' theory that the existence of low pressure areas would cause underground waste were sound, the inevitable operation and effect of the orders would be to cause waste. An examination of Original Exhibits Nos. 4, 5, 7, 8, 9, 10, 11, 12, 22 and 23 will disclose that the 494 wells connected to the pipe lines are distributed from practically one end of this tremendous gas field to the other. The trial court found (R. 177) that the leases on which the wells owned by the pipe lines are located in the West Panhandle field aggregate 523,063.97 acres, an average of about 1785 acres per well; that appellee Texoma's 90 wells are located on developed leases aggregating 81,928.44 acres, an average of 911 acres per well. The twelve wells of appellee Consolidated, while located on leases aggregating only about 1473 acres, in fact produce from five different sections of land, scattered over a large area (Original Exhibit 23). An examination of the exhibit just referred to will disclose, and the trial court found as a fact (R. 178), that these twelve wells are situated near the areas of low pressure, and the rock pressure of these wells and of other wells similarly situated with reference to low pressure areas tend to show that had appellee not produced its market requirements from these twelve wells, they would probably have substantially the same rock pressure as now obtaining, due to the heavy migration of gas from the areas in which these wells are situated and the high pressure area to the south thereof to the low

pressure areas immediately to the northeast thereof. The areas drained by these pipe lines on the whole are being rapidly depleted of gas through migration to the low pressure areas along the northeast flank of the field. (See Original Exhibits 5 and 23). There is no possibility that any low pressure area will ever develop as a result of the production by the pipe lines of the quantities of gas needed to perform their marketing contracts.

Do the orders transcend public necessity? The undisputed evidence shows, and the trial court found, that appellee Texoma owns leases aggregating approximately 200,000 acres in the West Panhandle field, representing an investment of approximately $13,000,000.00; that it has 90 wells on its leases and has constructed a main pipe line from the town of Fritch, in Hutchinson County, Texas, to a point near the town of Gray, Oklahoma; that it has constructed a compressor plant at the town of Fritch and gathering lines connecting its main line with its wells, at an additional cost of several million dollars; that an affiliated company, The Natural Gas Pipeline Company of America, has constructed a large trunk pipe line from Gray, Oklahoma, to Joliet, Illinois, at a cost of more than $35,000,000.00; that Texoma and its affiliated company together expended more than $500,000.00 in efforts to secure markets and marketing contracts for Texoma's gas; that the total investment of Texoma and its affiliated company, whose interests constitute one general project, is more than $72,000,000.00 (R. 172-173). The undisputed evidence also shows, and the trial court found, that appellee Consolidated owns leases in the East Panhandle field aggregating 10,273.53 acres; that it has twelve wells on these leases; that it owns a main pipe line leading from a point near its producing leases in Wheeler County, Texas, to Enid, Oklahoma, and on to the cities of Hutchinson and Wichita, in the State of Kansas, and has constructed gathering lines

connecting its wells with said main pipe line; that it has constructed branch lines leading from its main line to intermediate cities and towns to which it is selling and distributing gas; that its total investments aggregate more than $10,000,000.00, in addition to which it has expended substantial amounts in conducting negotiations for the marketing of its gas at points outside the State of Texas (R. 173-174).

The undisputed evidence shows, and the trial court found, that the highest per cent of the daily potential, over a period of one month, ever taken by appellee Consolidated from its twelve wells has been 6.53%, and that the average taken from all its wells from the beginning has been 4.89% (R. 176); that at the time of the trial, which was midwinter, appellee Texoma was producing its wells at the rate of 10% of their daily potential producing capacity; that this average throughout the year has been and will be substantially less than the average at the time of the trial (R. 180).

The court found also that, under the orders attacked, it is impossible for appellees and several other pipe lines owning wells and leases in the Panhandle to supply their marketing requirements and contracts from their own wells; that in order to comply with their marketing contracts and commitments, appellees and others similarly situated would be required to purchase gas from the owners of other wells in the field not connected to pipe lines, notwithstanding the pipe lines have an abundant supply of gas to fulfill all their marketing contracts and commitments (R. 182). Under the schedules attached to the orders, Texoma's wells were allowed to produce 136,133,000 cubic feet daily, and Consolidated's wells were allowed to produce 7,811,000 cubic feet daily (R. 533). The parties stipulated that the outlet of Texoma was more than 150,000,000 cubic feet daily, and that the market require-

ments of Consolidated were more than 25,000,000 cubic feet daily (R. 296). Thus it appears that Texoma would be required to purchase approximately 14,000,000 cubic feet of gas daily, and that Consolidated would be required to purchase approximately 17,000,000 cubic feet daily, which is 68% of its total market requirements. To obtain this, it would have to make connections with 65 additional gas wells (R. 217). In addition to the purchase price of the gas, appellees would be required to expend very substantial sums of money in the building of additional gathering lines, the installing of meters and other necessary expenditures to enable them to connect their present gathering lines with the wells of those from whom they would purchase gas (R. 211, 217-218). It will be necessary to go into these additional investments and into the cost of purchasing gas in more detail later in this brief. Here it is necessary to point out only that the enforcement of these orders will impose upon appellees enormous burdens and costs in order that certain private interests, who own wells in the Texas Panhandle but who have not exercised the forethought and made the sacrifices of skill, time and money necessary to develop markets and transport their gas to such markets, may be provided with markets and marketing facilities. Even if appellants were right in their deductions from the physical facts, the most interest that the public could have in the enforcement of these orders would be to prevent some inconsequential underground waste. We have demonstrated that this waste would not occur; but if the facts were to the contrary, the public would have no such interest in preventing this inconsequential waste, which at best might or might not occur, as would justify imposing these enormous burdens and costs upon appellees.

Even if the orders might have some slight tendency to prevent waste, which we do not concede, this tendency

would be so slight and would be accomplished at the price of such drastic, excessive and unnecessary restriction upon the appellees' right of private use of their property that the orders must be held confiscatory, as mere arbitrary fiats. In promulgating these orders, the Commission has exerted the power granted it to prevent waste far beyond the necessities of the case, and the enforcement of the orders would subject appellees' property to a confiscatory control transcending public necessity. *Peoples Pet. Prod.* v. *Smith, supra.*

If the Commission in fact believed that the existence of low pressure areas would cause the intrusion of water and the migration of gas over long distances, and that underground waste of gas and reduction in the ultimate recovery of gas would occur as a result, they could have issued orders requiring those responsible for the formation of these low pressure areas to curtail the production in these regions of low pressure to the end that the same might be repressured through the migration of gas from areas of higher pressure, thus reducing the differential in pressure between the present areas of high pressure and those of low pressure. It is very apparent from the record already discussed that the only character of waste which entered into the purposes of the Legislature at the time the statute was enacted, and into the purposes of the Commission at the time these orders were promulgated, was the overground waste then occurring as a result of the stripping of gas and popping the residue into the air. Public sentiment had become so aroused that the Legislature took note of this appalling dissipation of natural gas, and the present law was enacted absolutely prohibiting this practice. The Commission, finding that notwithstanding its own defense of the practice of stripping and wasting gas the Legislature and the public were demanding that the waste cease, sought

some means of compensating those guilty of this wasteful practice in return for requiring them to discontinue it. The public necessities would have been met entirely by a simple request to the Attorney General to enforce the provisions of House Bill 266 against those who were destroying the Panhandle gas field. It was not even necessary to issue an order to that effect, for the statute is self-executing. The public was not concerned and is not concerned with the difficulties occasioned by their financial limitations or lack of enterprise engaging in the business of producing and marketing gas. The public's interest was to conserve this great natural resource and prevent its ruthless dissipation and destruction by those who were engaged in this wasteful practice. In carrying out the mandate of the statute that it conserve the State's natural resources and prevent their waste, the Commission was without power to visit burdensome losses and costs upon the innocent by requiring them to compensate the guilty, by providing them with markets, before requiring the guilty to refrain from destroying the great Panhandle gas field. All the Commission had the power to do—indeed, all that it was necessary for it to do—was to enforce the statutes prohibiting waste against those who were offending against those statutes.

We quote from *H. & T. C. Ry. Co.* v. *City of Dallas*, 84 S. W. 648, in which the Supreme Court of Texas said:

> *"If it be true that there is to be no benefit to the public from the proposed change, or a benefit which is inconsiderable when compared with the detriment to be suffered by the respondent, who will say that it is just and reasonable to subject respondent to such expense and loss as is averred?* * * * While the convenience of the public in the use of the streets is generally to be considered and promoted, it may well be that in particular instances it should not be allowed to outweigh in the adoption of such measures as that under consideration a great and disproportionate injury to be inflicted on private industries in advancing it. When it

is found that a proposed action is to be fraught with such consequences as those averred in the answer, a public exigency correspondingly great and urgent should be required in its support."

5. APPELLEES HAVING RAISED IN THEIR PLEADINGS SERIOUS QUESTIONS OF CONFISCATION AND CHARGED VIOLATION OF THE CONSTITUTIONAL PROVISIONS AGAINST THE TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW AND WITHOUT COMPENSATION, IT IS WITHIN THE POWER OF THE COURT—INDEED, IT IS THE DUTY OF THE COURT—TO EXERCISE ITS OWN INDEPENDENT JUDGMENT IN DETERMINING THE QUESTIONS OF FACT, WITHOUT REGARD TO THE FINDINGS OF THE COMMISSION.

6. IN SO FAR AS THIS CASE PRESENTS A STATUTORY APPEAL FROM THE ORDERS OF THE COMMISSION, THE COURT WAS NOT BOUND BY THE FACT FINDINGS OF THE COMMISSION, BUT WAS REQUIRED FOR ITSELF TO DETERMINE THE WEIGHT OF THE TESTIMONY AND CREDIBILITY OF THE WITNESSES IN A DE NOVO HEARING.

Appellants begin their discussion of the questions presented under these points (appellants' brief, p. 177) with the contention that the statute directs the Commission to pro rate production of gas in the prevention of waste when the fact of the presence or imminence of waste is supported by a finding based on evidence, and in the adjustment of correlative rights when the evidence will support a finding that the aggregate lawful volume of the open flow or daily potential capacity to produce of all gas wells located in a common reservoir is in excess of the daily reasonable market demand. In other words, they take the position that if there be a finding by the Commission based on evidence, regardless of evidence to the contrary, to the effect that there is a presence or imminence of waste, that the Legislature has prescribed as a cure-all for the prevention of such waste the proration of gas production. The trial court

did not so construe the statute, and if the statute were subject to such construction it would be palpably arbitrary and unreasonable. Granted that the Legislature has the power to confer on the Railroad Commission the authority to pass regulations for the prevention of waste and to curtail the production from gas wells, if necessary to accomplish the prevention of waste, the Legislature certainly would be without power arbitrarily to prescribe proration of production as a means of preventing waste unless proration would actually accomplish such prevention. Later we shall show that if the statute is subject to appellants' construction, which the trial court held it is not, and directs the Commission to apportion the daily reasonable market outlet for gas among all the owners of gas wells in the field on the assumed premises that such apportionment or proration will protect the correlative rights of all the owners, it is just as unreasonable and arbitrary.

In their approach to a discussion of the authorities they cite, appellants characteristically proceed upon a false premise. They contend (R. 180), "that the ratable production features of House Bill 266 and the orders of the Railroad Commission carrying the same into effect will result in a substantially greater ultimate recovery of gas from the Panhandle gas reservoir than would be recovered if appellees and those similarly situated are permitted to produce from their own wells all of the sweet gas which is produced from such reservoir." In the first place, the statute as construed by appellants does not prescribe ratable production, but leaves to the Commission the matter of apportioning the production "on a reasonable basis"; and the orders of the Commission, we have already pointed out, necessarily operate to cause a condition far afield of ratable production. We shall have more to say on this point later. In the second place, appellees and those similarly situated are not going to produce from their wells all the sweet gas which is pro-

duced from the reservoir. We have already pointed out that the owners of sour gas wells were permitted to produce 520,496,000 cubic feet daily under the order of December 18, 1935 (R. 497-8), from 211 wells located on 33,750 acres of the 270,000 acres comprising the sour gas area. The evidence above pointed out shows conclusively that this heavy production will cause sweet gas to migrate into the sour gas area, where, of course, it will become contaminated with sulphur compounds and be produced as sour gas. Again, the oil wells in the sweet gas area are producing enormous quantities of gas, as already pointed out,—a total of 459,000,000 cubic feet daily from both sweet and sour oil wells in excess of the published maximum gas-oil ratio. The evidence shows (Original Exhibits 4, 5, 22 and 23) that a large proportion of the oil wells are in the sweet gas area. Enormous quantities of sweet gas are being drained to the oil wells in both the sweet and the sour gas areas by virtue of these oil well operations (Original Exhibit 5).

It will be noted (R. 249) that sweet gas may be used for efficient chemical manufacture, other than for the manufacture of carbon black, for repressuring and for the extraction of natural gasoline, when the residue is returned to the horizon from which it is produced. The record discloses no extensive sweet gas uses for those purposes at the present time, but that the legislature recognizes such prospective uses is manifest from its express declaration that sweet gas may be so used. It is perfectly safe to assume that additional pipe line outlets for sweet gas from this field will be developed in the future. The record shows (R. 371-2) that, prior to the trial, one of the pipe lines, Panhandle Eastern, had signed a contract to supply gas to the City of Detroit, Michigan. It is a matter of common knowledge that such line has since been completed. It is also a matter of common knowledge that this company is one of the two pipe line companies mentioned in the Order

of December 10, 1935, who are taking gas from other wells than their own. The record shows that Phillips Petroleum Company is a purchaser of sweet gas amounting to about thirty to forty million cubic feet daily (R. 329). It appears, therefore, that appellants are wholly without justification in their observation that, absent the operations of the statutes and orders attacked, the present pipe lines will take all the sweet gas from wells on their own leases.

Ignoring the evidence just pointed out and the findings of the court resolving the fact against them, appellants throughout their brief assume, and on pages 180 and 181 expressly assert, in substance, that the trial court, in the first instance, was bound, and now this Court is bound, by the presumption that the Legislature had before it sufficient facts to justify the statute, and that the Commission had before it sufficient facts to justify the orders. They introduce and discuss evidence of the history of the controversy leading up to the legislation and the character of the problem before the Legislature, emphasizing the circumstance that certain owners had no market outlets for their gas; but they deny appellees the right to show by the same evidence and other evidence that the statute, as they interpret it, was passed, not with an eye single to the accomplishment of any object properly within the police power, but solely for the purpose of requiring appellees to purchase gas from other well owners and thus divide their markets and pipe line facilities. This evidence they offer in support of their contention that the statute should be construed as more than a waste statute. Neither in their specifications of error nor elsewhere do they attack the finding of the trial court to the effect that the necessary operation and effect of the statute, as construed by appellants, and the orders is to require appellees to buy gas from other owners and thus divide their markets and facilities

with other ow[illegible]ners. Appellants answer this finding with the mere state[illegible]ment (p. 17, appellants' brief):

"The c[illegible]ourt should not be concerned with possible hidden pu[illegible]rposes or motives of the Legislature or the Commissi[illegible]on, nor with the question of whether appellees are g[illegible]uilty or innocent of the practice of disproportionate[illegible] and unratable production or of underground waste aga[illegible]inst which the statute is directed, or the degree of th[illegible]eir culpability."

Upon what r[illegible]eason has this, our Caesar, fell? Since when has it become [illegible] the rule that the courts, in determining the constitutional [illegible] rights of litigants, cannot inquire into such hidden motives [illegible] as are reflected by the necessary operation and effect of a [illegible] statute or of an administrative order? The contention of a[illegible]ppellants just quoted is squarely in conflict with the unifo[illegible]rm holdings of this Court.

Thus, in *G. C[illegible]. & S. F. Ry. Co. v. Ellis*, 165 U. S. 150, 154; 41 L. E. 666, t[illegible]he court said:

"While [illegible] good faith and a knowledge of existing conditions on [illegible] the part of the Legislature is to be presumed, yet [illegible] to carry that presumption to the extent of always hol[illegible]ding that there must be some undisclosed and unkno[illegible]wn reason for subjecting certain individuals or corpora[illegible]tions to hostile and discriminating legislation is to m[illegible]ake the protecting clauses of the Fourteenth Amendmen[illegible]t a mere rope of sand, in no manner restraining s[illegible]tate action."

In *Chastleto[illegible]n Corp. v. Sinclair*, 264 U. S. 543, 547; 68 L. E. 841, the [illegible] court said, in passing upon declarations of fact of the Leg[illegible]islature:

"A cour[illegible] is not at liberty to shut its eyes to an obvious mist[illegible]ake when the validity of the law depends upon the t[illegible]ruth of what is declared."

Again, in *Ca[illegible]rter v. Carter Oil Co.*, 80 L. E. 740, decided May 18th, 1936:

"To a co[illegible]nstitutional end many ways are open; but to an end n[illegible]ot within the terms of the constitution, all ways are c[illegible]losed. * * * Whether the end sought to

be attained by an act of Congress is legitimate is wholly a matter of constitutional power and not at all of legislative discretion."

This Court held, in *Treigle* v. *Acme Homestead Ass'n*, 80 L. E. 391, decided February 3, 1936:

"Police power must be exercised for an end which is in fact public, and the means adopted must be reasonably adapted to the accomplishment of that end, and must not be arbitrary or oppressive."

This Court has uniformly held that when it is contended by a litigant that the operation and effect of a statute or an administrative order will operate to take property and the use of property without due process of law, or to take property for a public use without compensation, it is not only within the power of the court but it is the duty of the court to investigate all the facts and determine for itself the credibility of the witnesses and the weight to be given their testimony. The determination of these constitutional questions, which necessarily involve the truth or falsity of the contentions on the facts, is a judicial function, and a statute purporting to deprive the court of the power to determine such fact issues would itself be invalid.

Ohio Valley Water Co. v. *Ben Avon Borough*, 253 U. S. 287, 64 L. E. 908, was a suit to review a judgment of the Supreme Court of Pennsylvania. The Public Service Commission of that State had established a rate from which the company appealed to the Superior Court. The latter reversed the order of the Commission and an appeal was taken to the Supreme Court of the State, which reversed the decree of the Superior Court and reinstated the order of the Commission. The opinion of the State Supreme Court (*Ben Avon Borough* v. *Ohio Valley Water Co.*, 103 Atl. 744) discloses that the statute read:

"In all such cases the orders of the Commission shall be prima facie evidence of the reasonableness thereof, and the burden of proof to the contrary shall be upon the appellant or appellants."

Basing its opinion upon the decisions of the United States Supreme Court in *Interstate Commerce Commission* v. *I. C. Ry. Co.*, 215 U. S. 452, 54 L. E. 280, and *I. C. C.* v. *U. P. Ry. Co.*, 222 U. S. 541, 56 L. E. 308, and on *People* v. *McCall*, 113 N. E. 795, 245 U. S. 345, 62 L. E. 337, the last two of which cases are cited and discussed by appellants in their brief as supporting their views, the Supreme Court of Pennsylvania held that the trial court had merely substituted its judgment for that of the Commission, and reversed the trial court. In this case appellant contended that the interpretation of the public service law by the Pennsylvania Supreme Court requiring the Superior Court to sustain the order of the Commission if there was any substantial evidence to support it deprived the water company of its constitutional right to a judicial review of the Commission's action. This Court sustained that contention in the following language:

> "In all such cases, if the owner claims confiscation of his property will result, the State must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the Due Process Clause, Fourteenth Amendment."

In *Bluefield Water Works Co.* v. *Public Service Commission*, 262 U. S. 679, 67 L. E. 1176, this Court, in reviewing a judgment of the Supreme Court of Appeals of West Virginia relating to an order of the Public Service Commission prescribing rates for supplying water, held:

> "Plaintiff in error is entitled under the Due Process Clause of the Fourteenth Amendment to the independent judgment of the court as to both law and facts."

In *Lehigh Valley Ry. Co.* v. *Public Utilities Commission*, 278 U. S. 24, 73 L. E. 161, this Court discussed the question here presented and quoted with approval certain hold-

ings of the New Jersey Court of Appeals, including the following language:

> "All these considerations lead us to the conclusion that if there is any presumption in favor of the order of the Commissioners, it depends, like the opinion of the court of another state, upon the strength of the reasoning by which it is supported. This is subject, however, to the qualification that in legislative action the courts will not merely substitute their judgment for that of a legislative body. We must, therefore, determine for ourselves upon all the evidence, whether the former rate for gas was unjust and unreasonable, and whether the new rate is just and reasonable."

In *United Ry. & Electric Co.* v. *West*, 280 U. S. 234, 74 L. E. 390, this Court, in reviewing an order of the Maryland Commission, held:

> "The court in the discharge of its constitutional duty on the issue of confiscation must determine the amount to the best of its ability in the exercise of a fair, enlightened and independent judgment as to both law and facts."

In *Prentis* v. *Atlantic Coast Line Company*, 211 U. S. 210, 53 L. E. 150, this Court said:

> "The determination as to their rights turn[s] almost wholly upon the facts to be found. Whether the property was taken unconstitutionally depends upon the valuation of the property, the income to be derived from the proposed rate, and the proportion between the two—pure matters of fact. When those are settled the law is plain. All their constitutional rights, we repeat, depend upon what the facts are found to be. They are not to be forbidden to try those facts before a court of their own choosing if otherwise competent."

Chastleton Corporation v. *Sinclair*, 264 U. S. 543, 68 L. E. 841, involved a bill to restrain the enforcement of an order of the Rent Commission of the District of Columbia.

The rent laws attacked had been held constitutional in *Block* v. *Hirsch*, referred to in the opinion. This Court held, however, that one always has the right to show that

conditions are such with reference to a particular individual that there is a constitutional invasion of property rights, and that it can even be shown that conditions have changed since the law had been held valid, necessitating the holding that, as applied to a particular situation, the law is invalid. Discussing the facts, this Court held that a court is not at liberty to shut its eyes to an obvious mistake when the validity of the law depends on the truth of what is declared. Citing the *Prentis* case and numerous other cases, the Court said:

> "These cases show that the court may ascertain as it sees fit any fact that is merely a ground for laying down a rule of law. * * *. Obviously, the facts should be accurately ascertained and carefully weighted."

This principle was emphatically announced by this Court in *Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194, 79 L. E. 281, involving an attack on an order of the Milk Control Board. A three-judge court dismissed the bill, and an appeal was taken to this Court, which remanded the case with instructions directing the trial court to hear the evidence. In the opinion the Court said:

> "Respondents invoke the presumption which attaches to the legislative action. But that is a presumption of fact, of the existence of factual conditions supporting the legislation. As such, it is a rebuttable presumption. It is not a conclusive presumption, or a rule of law which makes legislative action invulnerable to constitutional assault. Nor is such an immunity achieved by treating any fanciful conjecture as enough to repel attack. When the classification made by the legislature is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, *or to other legitimate proof*, that the action is arbitrary. * * *
>
> "But where the legislative action is suitably challenged and a rational basis for it is predicated upon

> the particular economic facts of a given trade or industry, which are outside the sphere of judicial notice, these facts are properly the subject of evidence and of findings. * * * When it becomes necessary for the court to deal with the facts relating to particular commercial or industrial conditions, they should be presented concretely with appropriate determinations upon evidence, so that conclusions shall not be reached without adequate factual support."

In *Hammond* v. *Schappi Bus Line*, 275 U. S. 164, 72 L. E. 218, this Court pointed out that the evidence on application for a temporary injunction was not of such character that findings could be made with confidence; that there was a lack of definiteness in some of the affidavits, and serious conflicts on issues of fact were presented. The court then held:

> "Before any of the questions suggested, which are both novel and of far reaching importance, are passed upon by the court, the facts essential to their decision should be definitely found by the lower courts upon adequate evidence."

The power of the court to determine facts in confiscation cases was recognized in *Nashville C. & S. Ry Co.* v. *Walters*, 294 U. S. 405, 79 L. E. 949, this court again held that a statute valid as to one set of facts might be invalid as to another; that a statute valid when enacted may become invalid by a change in the conditions to which it is applied; that the police power is subject to the constitutional limitation that it may not be asserted arbitrarily and unreasonably; that the promotion of public convenience will not justify requiring of a Railroad Company the expenditure of money unless a duty to provide that convenience rests upon it; and that the imposition upon particular individuals of the cost of advancing the public convenience must bear some reasonable relation to the evils to be eradicated or the advantages to be secured.

Commenting upon the refusal of the State Supreme

Court to consider the facts relied on as showing that the order was arbitrary and unreasonable, and its holding that it could not consider the special facts presented, this Court held:

> "Unless the evidence and the special facts relied on were of such a nature that they could not conceivably establish that the action of the State in imposing upon the railway one-half of the cost of the underpass was arbitrary and unreasonable, the Supreme Court obviously erred in refusing to consider them."

Crowell v. *Benson,* 285 U. S. 22, 76 L. E. 598, involved an attack on the finding of a deputy commissioner acting under the law governing the United States Employees Compensation Commission that a certain person was entitled to compensation, the statute purported to authorize the deputy commissioner to "have full authority to hear and determine all questions in respect to the claim." The court held that the attempt to give these broad powers to the deputy commissioner would not be binding on the courts because the judicial fact issues of locality of injury and relationship of master and servant presented constitutional questions, and that a construction of the law that would deprive the courts of power to determine these judicial questions would render the law invalid. This holding is very pertinent to the facts of the case at bar. The jurisdiction of the Commission to act must rest upon the existence or imminence of waste. If waste does not exist or is not imminent, then the Commission is without jurisdiction to act, and this issue must be determined by the court. In doing so, it must of necessity proceed as in a *de novo* matter. We quote from the opinion:

> "In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and of law, necessary to the performance of that supreme function. The case of confiscation is illustrative—the ultimate conclusion al-

most invariably depending upon the decisions of questions of fact. This court has held the owner to be entitled to a fair opportunity for submitting that issue to a judicial tribunal for a determination upon its own independent judgment as to both law and facts (citing Ben Avon case and others).

"In the present instance the argument that Congress has constitued the deputy commissioner a fact finding tribunal is unavailing, as the contention makes the untenable assumption that the constitutional courts may be deprived in all cases of the determination of facts upon evidence, even though a constitutional right may be involved. * * * But when fundamental rights are in question, this court has repeatedly emphasized 'the difference in security of judicial over administrative action.' * * *

"As the question is one of the constitutional authority of a deputy commissioner as an administrative agency, the court is under no obligation to give weight to his proceedings pending the determination of that question. * * * We think that the essential independence of the exercise of the judicial power of the United States in the enforcement of constitutional rights, requires that the Federal Court should determine such an issue upon its own record and the facts elicited before it."

Since the enactment of the statute relating to appeals from the Interstate Commerce Commission in 1906, this Court, in *I. C. C.* v. *I. C. Ry. Co.*, 215 U. S. 452, 54 L. E. 280; *Interstate Commerce Commission* v. *U. P. Ry. Co.*, 222 U. S. 541, 56 L. E. 308, has held that on a review by the courts, the findings of the Commission will not be disturbed if supported by evidence, and that the court will not examine the facts further than to determine whether there was substantial evidence to support the order. Such was not the rule prior to this amendment in 1906. *I. C. C.* v. *Alabama M. Ry. Co.*, 168 U. S. 144, 42 L. E. 414. But even in those cases the court expressly declared its continued power and duty to pass independently upon the facts involving (a) all relevant questions of constitutional

power or right; (b) all pertinent questions as to whether the order was within the scope of the delegated authority; (c) whether the authority had been manifested in such an unreasonable manner as to cause it in truth to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of power; and (d) whether the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law. This case clearly falls within the exceptions just enumerated.

The authorities on which appellants rely are, on the whole, without application to a case of this character. Those which do apply to the facts of this case are authority for the position of appellees. In one of these cases, *St. Joseph Stockyards Co.* v. *United States,* 80 L. E. 679, decided April 27, 1936, this Court once more announced the rule on which we stand. We quote from the opinion:

> "But the Constitution fixes limits to the rate-making power by prohibiting the deprivation of property without due process of law or the taking of private property for public use without just compensation. When the legislature acts directly, its action is subject to judicial scrutiny and determination in order to prevent the transgression of these limits of power. The legislature cannot preclude that scrutiny or determination by any declaration or legislative finding. Legislative declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained. Nor can the legislature escape the constitutional limitation by authorizing its agent to make findings that the agent has kept within that limitation. Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive

where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards. That prospect, with our multiplication of administrative agencies, is not one to be lightly regarded.''

In a later case, *B. & O. Ry. Co.* v. *United States*, 80 L. E. 853, 862, decided on May 18th, 1936, the court said:

''There is a wide and fundamental difference between the question whether the commission, in prescribing divisions found by it to be just, reasonable and equitable, complied with the procedural requirements of the Act, and whether, if enforced against objecting carriers, the order will confiscate their property. The commission's findings of fact in the field first mentioned, if based on evidence, are conclusive. But, upon the question whether prescribed divisions constitute just compensation within the meaning of the Fifth Amendment, Congress is without power conclusively to bind the carriers. As the Congress itself could not be, so it cannot make its agents be, the final judge of its own power under the Constitution. Congress has no power to make final determination of just compensation or to prescribe what constitutes due process of law for its ascertainment.''

In *H. & T. Ry. Co.* v. *City of Dallas*, 84 S. W. 648, the Supreme Court of Texas, in an opinion by one of our ablest Texas judges, dealing with this question in an attack on a city ordinance, said:

''The power is not an arbitrary one, but has its limitations. It is commensurate with, but does not exceed, the duty to provide for the real needs of the people in their health, safety, comfort and convenience as consistently as may be with private property rights. As those needs are extensive, various and indefinite, the power to deal with them is likewise broad, indefinite and impracticable of precise definition or limitation. But as the citizen cannot be deprived of his property without due process of law, and as a priva-

tion by force of the police power fulfills this requirement only when the power is exercised for the purpose of accomplishing, and in a manner appropriate to the accomplishment of, the purposes for which it exists, *it may often become necessary for courts, having proper regard to the constitutional safeguard referred to in favor of the citizen, to inquire as to the existence of the facts upon which a given exercise of the power rests,* and into the manner of its exercise, and if there has been an invasion of property rights under the guise of this power, without justifying occasion, or in an unreasonable, arbitrary and oppressive way, to give to the injured party that protection which the Constitution secures. It is therefore not true, as urged by plaintiff, that the judgment of the legislative body concludes all inquiry as to the existence of facts essential to support the assertion of such a power as that now in question. If this were true, it would always be within legislative power to disregard the constitutional provisions giving protection to the individual. The authorities are practically in accord upon this subject."

The decisions of the Texas Supreme Court, the court of last resort in that State, as to the power and duty of the court in appeals from orders of the Railroad Commission are exactly contrary of the statements contained in appellants' brief. Article 6049c, Section 8 (Acts 1935, p. 180), provides:

"Any interested person affected by the conservation laws of this state relating to crude petroleum oil or natural gas, and the waste thereof, including this act, or by any rule, regulation or order made or promulgated by the Commission thereunder, and who may be dissatisfied therewith, shall have the right to file a suit in a court of competent jurisdiction in Travis County, Texas, * * * to test the validity of said laws, rules, regulations or orders. * * * In all such trials the burden of proof shall be upon the party complaining of such laws, rule, regulation or order, and such laws, rule, regulation or order so complained of shall be deemed prima facie valid."

Section 24 of House Bill 266 provides:

> "Any person may appeal for judicial review from any rule, order or regulation of the Commission made and promulgated under the authority conferred by this article, in the same manner, upon the same conditions and to the same court or courts as prescribed in the chapter for appeals from other rules, regulations or orders of the Commission promulgated under the general conservation statutes of this State."

We point out that these statutory provisions merely place the burden of proof on the plaintiff, without requiring that proof to be made by "clear and satisfactory evidence" as required in appeals from orders of the Commission affecting other interests than the oil and gas industry.

In *Railroad Commission* v. *Houston Chamber of Commerce,* 78 S. W. (2) 591, the Commission of Appeals, in an opinion adopted by the Supreme Court, held that, under the statutes now in force, a controversy involving a direct attack on an order of the Railroad Commission must be determined, so far as the burden of proof is concerned, by the same rules governing in ordinary civil cases.

In *Railroad Commission* v. *H. & T. C. Ry. Co.,* 90 Tex. 340, *Railroad Commission* v. *Weld and Neville,* 96 Tex. 394, and *G. C. & S. F. Ry. Co.* v. *Railroad Commission,* 116 S. W. 795, the Supreme Court of Texas unequivocally declared it to be the duty of the court to hear the facts as in ordinary civil cases. These cases involved appeals from orders affecting the operation and rates of railroads; but the burden resting upon the plaintiff in an appeal from such orders was heavier than the burden resting upon the plaintiff in an appeal from an order affecting the oil and gas business. In the case of railroad appeals, Article 6454 provides that the burden of proof shall rest on the plaintiff to show that the rates complained of are unreasonable and unjust as to them, whereas the statutes governing ap-

peals such as the present case, as already pointed out, provides only that the burden of proof shall be on the party complaining of such laws, rules, regulations or orders, with the further provision that the latter shall be deemed prima facie valid. In the first case cited the Supreme Court of Texas specifically held that there is no necessity for any provisions relating to appeal if the orders are confiscatory, because the courts already had power to determine that question.

The trial court did hear the evidence and did exercise its own independent judgment in its findings of fact and in its conclusions of law. In this they not only acted within their power as declared by the authorities we have cited, but they performed their clearly defined duty as declared by the same authorities and by numerous other cases by this court. As observed in the beginning of this discussion, we do not believe that appellants, under the specification of errors contained in their brief, are entitled to attack the unequivocal findings of the trial court to the effect that the underlying purpose of the orders is not to prevent waste, but to coerce appellees and others similarly situated to divide their markets and marketing facilities with other persons; that appellees and those similarly situated have committed no waste, caused no waste, or contributed to any waste; that no waste of any character and no reduction in the ultimate recovery of gas from the reservoir will result from the production by appellees and those similarly situated of the quantity of gas necessary to fulfill their private marketing contracts; that the orders under attack have no reasonable relation to the prevention of waste; and that they transcend public necessity and are therefore arbitrary and confiscatory as applied to appellees and those similarly situated. But in any event, these findings are sustained by the overwhelming testimony. For the most part they are

sustained by the uncontradicted testimony. We have not undertaken to quote or even point out in the record all of the facts which sustain these findings of the trial court. The evidence is voluminous and some of the testimony is of a highly technical character. To set out in detail the evidence bearing upon these findings would make this brief too long. In view of the character of the evidence and the nature of the questions involved the Court will doubtless find it desirable to read the transcript of the testimony and to examine the original exhibits which have been filed with the clerk as a part of the record in this case.

II.

The Trial Court Correctly Held That the Legislature Did Not Intend by the Statute to Authorize the Commission to Limit Production of Natural Gas Except for the Purpose of Preventing Waste.

1. THE LANGUAGE OF THE STATUTE IS SUSCEPTIBLE OF THE CONSTRUCTION PLACED ON IT BY THE TRIAL COURT.

2. THE CONSTRUCTION FOR WHICH APPELLANTS CONTEND WOULD RENDER THE STATUTE UNCONSTITUTIONAL IN THE PARTICULARS PLEADED BY APPELLEES AND SET FORTH IN THE TRIAL COURT'S CONCLUSIONS OF LAW.

3. THE TRIAL COURT WAS REQUIRED, UNDER A WELL SETTLED RULE, TO SO CONSTRUE THE STATUTE AS TO RENDER IT CONSTITUTIONAL RATHER THAN UNCONSTITUTIONAL, AND TO GIVE IT A MEANING, IF ITS TERMS PERMITTED, WHICH DOES NOT PUT IT IN OPPOSITION TO THE FUNDAMENTAL LAW.

In its conclusions of law (R. 183) the trial court held, in substance, that the statute attacked is a waste statute; that the Legislature did not intend to authorize the Commission to prorate or limit production except to prevent waste; that

in the event it should become necessary to restrict production to prevent waste, the provisions of the statute pertaining to correlative rights require the Commission to adjust the production so that each owner may recover a quantity of gas substantially equivalent in amount to the recoverable gas under his land, and to limit the owner of a smaller tract to his just proportion of the gas produced. It also held (R. 185) that if its construction be approached in the light of constitutional limitations, the conclusion is further compelled that the statute was not intended to have, and cannot be given, the meaning for which appellants contend, to the effect that the act should be construed as authorizing the Commission to prorate production, in the absence of waste, on a mere consideration of compelling the owners of private market outlets and facilities for transmitting gas to market to share them with those not interested in same.

The court further held (R. 184-5) that if the Legislature intended to empower the Commission to limit and prorate production except for the purpose of preventing waste, the act and orders are invalid and unenforcible against appellees for the following reasons: that their necessary operation and effect is to confiscate, without compensation, appellee's private markets, developed by them as a means of disposing of their own gas reserves, and devote them to others who have no interest in such markets and who have contributed nothing to their development; that their necessary operation and effect is to confiscate the use of appellees' pipe lines and other facilities, which they have constructed at enormous cost as a private enterprise for transmitting their own gas to their own private markets, and, without compensation, to devote them to the use of those who have no interest in same and who have contributed nothing to their construction or cost; that their necessary operation and effect is to prevent appellees from protecting themselves, to the extent that they are able to market their

gas, against the enormous losses by drainage now occurring and which will continue to occur from their leases located in areas of high pressure to existing low pressure areas; that they serve no public interest; that they operate, therefore, to confiscate and take from appellees their property and the use of their property without due process of law, and deny appellees the equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States, and of Sections 16, 17 and 19, Article I, of the Constitution of Texas, and deprive appellees of their liberty and property in violation of the impairment of contracts clause of Section 10, Article I, of the Constitution of the United States, and take, damage and destroy appellees' property for a purported public, but in fact private, use, without compensation and without appellees' consent, in violation of Section 17, Article I, of the Constitution of Texas.

It concluded further (R. 186) that, under a well established rule, it was required to give the statute a construction that would render it constitutional rather than unconstitutional; that this principle demands that it construe the statute as it has construed it, because any other construction would place the act in direct and fatal opposition to both the State and Federal Constitutions as above stated, and in addition, that if the act be construed as intending to appoint the Commission as a body to ascertain and partition rights of oil and gas owners, it would be in direct and palpable violation of Section 1, Article II, of the Constitution of Texas, in that, contrary to that provision, it would be an attempt to delegate to the Commission both legislative and judicial powers, leaving it at will, by regulations of its own devising, to take from one and give to others property and rights in property and the use thereof.

Later in this brief we shall show that the trial court correctly held that, under the construction for which appel-

lants contend, the statute would be unconstitutional in the particulars held by the trial court. It is our purpose here to show that the statute was subject to the trial court's construction, and that it was required to give it a meaning which would not put it in opposition to the fundamental law.

The appellants contend that in construing the statute for the purpose of arriving at the legislative intent, the trial court should consider the history of the legislation and the problem before the Legislature. Under Division I, Subdivision 1, we have stated some of the history leading up to the enactment of House Bill 266. In addition, we call attention to some other facts reflected by the record concerning the conditions prevailing in this great gas field at the time the statute was enacted. Peterson's pressure map (Original Exhibit No. 5) tells the story more impressively than we can in words. This map and the other facts reflected by the record show that as a result of the production of tremendous quantities of gas along with the oil in the oil fields scattered along the northeastern border of this great reservoir, and as a result of the enormous production of gas from gas wells in concentrated areas surrounding stripping plants in or in close proximity to these same oil producing areas, the reservoir pressures have been so reduced along the northeastern flank of the reservoir as to cause migration of gas on an enormous scale from the areas of high pressure on the south and southwest to these low pressure areas; that already this migration has reduced the original pressures over a very substantial proportion of the entire reservoir to levels far below the original pressure of 430 lbs. per square inch—in some instances as low as 150 lbs. The record shows that the portion of the field lying approximately half way between the northeast and southwest lines throughout the length of the field was originally the most productive portion of the reservoir (R. 329, See

also Gill's formation cross section and total thickness graph, Original Exhibit 37). The pressure map above referred to shows that these most productive, and therefore most valuable, portions of the field have already been depleted of a large proportion of their original reserves of gas. This migration will continue, and this most productive section of the field will consequently continue to be depleted of enormous reserves of gas for an indefinite period, even if the rate of production along the northeast side of the field be substantially reduced (R. 178). But we have already shown that tremendous quantities of gas are still being produced in the oil fields and in the portion of the gas fields which produces sour gas alone. The leases and reserves owned by the pipe lines, including those of appellees, are located in the sweet gas areas on relatively high structural positions, where the higher pressures prevail. Most of the other gas wells and all of the oil wells are located on lands lying between these reserves and the structurally lower edge of the reservoir, where the low pressures prevail (R. 176). It is manifest, therefore, that very large quantities of gas have migrated from the reserves of the pipe lines, including those of appellees, to the low pressure areas in and around the oil fields, and that the migration of gas from the reserves of the pipe lines to those areas of low pressure will continue over a long period of time without regard to the rate of withdrawal in existing areas of low pressure. The trial court so found (R. 178).

These unfortunate conditions were brought about by the profligate waste of gas in the early history of the oil field when little or no value was placed on gas (R. 143-144). In the very order under attack the Commission declared that in excess of 2,000,000,000,000 cubic feet of gas produced from oil wells had been wasted to the air (R. 144). The practice of stripping gas of its natural gasoline content and

wasting the residue to the air, which began under permits of the Railroad Commission and continued until the enactment of House Bill 266, as already pointed out, grew to such proportions that the strippers alone were wasting to the air more than 1,000,000,000 cubic feet of gas daily at the time of the enactment of this statute. The comparative quantities of gas utilized by the pipe lines and that produced by others, the major portion of which was wasted to the air as aforesaid, is reflected in Original Exhibit No. 13, a cut of which appears opposite page 150 of this brief.

Appellants admit that there was great public alarm concerning this wastage and a great public clamor for legislation that would stop it and thus prevent the entire destruction of this priceless natural resource in the Texas Panhandle. That was the problem before the Legislature when it enacted House Bill 266. As pointed out in Division I, Subdivision 1, of this brief, there was no agitation or discussion of any claimed underground waste presented to the Legislature or considered by the Legislature in connection with the enactment of this statute.

Appellants take great pains to point out on pages 30 to 39 of their brief that the provisions of House Bill 266 prohibiting underground waste are substantially in accord with the already existing statutes prohibiting such underground waste. They admit that the only reason the provisions with reference to underground waste were inserted in House Bill 266 was to make this statute complete in itself (appellants' brief, p. 38). In other words, in amending the statute so as to effectively prevent a continuance of the destructive overground waste which threatened the very life of the field, the Legislature, of course, desired to retain in the statute those provisions, which, long before, it had enacted for the prevention of underground waste and some forms of overground waste. It would have been an incon-

ceivable oversight had the Legislature failed to incorporate in the amended waste statutes the provisions providing for the prevention of such waste which had been enacted from time to time prior to the enactment of House Bill 266.

Far from intending to modify or otherwise tamper with existing correlative rights of owners of natural gas reserves, the intent of the Legislature in enacting House Bill 266 was to add to the existing waste statutes other effective provisions, not contained in the existing statutes, which would make it impossible for the profligate and shameful dissipation of gas by strippers to be continued.

Prior to the enactment of House Bill 266 the trial court, in the three groups of cases above referred to, had held that, in the absence of waste, appellees and those similarly situated have a right, under the Fourteenth Amendment and the other constitutional provisions pleaded, to produce their market requirements from their own properties. The orders under consideration were substantially to the same effect and purpose as the orders here involved. The Legislature could not change the constitution or repeal any of its provisions by enacting another law that leads inevitably to the same result as the common purchaser law, involved in the first group of cases decided by the trial court, the market demand law, as construed by appellants in the last group of cases, the orders promulgated under these statutes, and the shut down orders, involved in the second group of cases. If the statute is to be upheld, it must be upheld as a waste prevention statute.

Section 1 of the act, quoted on page 243 of appellants' brief, reads:

> "Declaration of policy: In recognition of past, present, and imminent evils occurring in the production and use of natural gas, *as a result of waste in the production and use thereof in the absence of correlative opportunities of owners of gas in a common reser-*

voir to produce and use the same, this law is enacted for the protection of public and private interests against such evils by prohibiting waste and compelling ratable production."

The way this clause, beginning with the comma in the third line thereof and ending with the last comma, reads, it seems clear that the expression "absence of correlative opportunities", of which appellants speak, qualifies the word "waste", showing that the Legislature intended to protect correlative rights and opportunities in such regulations as might be necessary to prevent waste.

The portion of Section 14, quoted and italicized by appellants at page 27, and discussed on pages 27 to 29 of their brief, has no such significance as that for which appellants contend. Natural gas cannot be stored, as can most other commodities. It can be delivered to the ultimate consumer only by pipe lines connecting the wells at the source of supply with the burner tips of the consumers (R. 174). The other sections of House Bill 266 expressly prohibited the production of natural gas unless used for some of the prescribed purposes set forth in the statute. Its use for other purposes was expressly prohibited. Since gas cannot be produced and stored, as can oil, wheat, cotton and many other commodities, it follows necessarily that unless used for one of the purposes permissible under the statute, gas would of necessity be wasted or unlawfully utilized. Therefore, it is impossible to produce gas in excess of the market demand therefor without waste or unlawful utilization. This provision of Section 14 is simply a reiteration, in effect, of the other provisions of the statute declaring it unlawful to produce natural gas until it can be utilized for lawful purposes.

We regret that in their discussion of this question and throughout their brief, appellants have stated conclusions and made deductions that are wholly unjustified by the rec-

ord. We cannot allow all of these statements to go unchallenged. For instance, on page 20 they assert that from 1931 to 1933 the only persons who were able to produce any gas from the sweet gas portions of the Panhandle fields were the pipe line companies and those who had connections with the pipe line companies. The record shows without contradiction that tremendous quantities of sweet gas were being produced from oil wells during that period. It was permissible to burn sweet gas into carbon black under the statutes existing at that time; and on page 22 of their brief appellants admit that sweet gas in large quantities was then being so used. Original Exhibit No. 13 and a cut thereof shown opposite page 150 of this brief show that during the years 1931, 1932 and 1933 the pipe lines produced only a small fraction of the total production for those years.

On page 21 they assert that the Legislature by statutes and the Railroad Commission by orders sought to remedy these "evils" (referring to overground waste and disproportionate production) *brought about* by the practices of the pipe line companies. In the light of this record, including the court's finding (R. 182-184) that no evidence was offered—indeed, it was not even seriously claimed—that anything appellees had done or contemplated doing had in the slightest degree contributed or will contribute to this waste, and the uncontradicted picture reflected by the cut above referred to and the testimony of the witnesses, all of whom corroborated the facts reflected by this cut, it is unthinkable that appellants would bring this unfounded indictment against the pipe lines.

On page 22 they again state that during the years 1933 and 1934, *for the first time,* the amount of production was in favor of the producers connected to the carbon black and stripping plants and against the pipe line companies. This had always been the situation, as clearly shown by the cut above referred to.

In a footnote on this page appellants assert that *Sneed* v. *Phillips Petroleum Co.*, 76 Fed. (2) 785, and companion cases were financed by Texoma Natural Gas Company. The record shows (R. 378) that that company made a contribution which helped to pay the fee of one of the attorneys in that litigation. The notes at the head of the report of this case, 76 Fed. (2) 785, show that this attorney was of counsel only in No. 7584, the Britain case. Sneed was represented by two other lawyers, and Schafer by still another, whom Texoma did not help to pay.

In a footnote on page 29, appellants make the statement that the record shows that all the potential markets within 900 miles of the Panhandle gas field are already supplied with natural gas. Evidence introduced by appellants themselves shows conclusively to the contrary (Original Exhibit No. 6). This map and the cross-examination concerning it of appellants' witness J. B. Massa (R. 328) shows that there are no gas pipe lines protruding into the State of Wisconsin, where Milwaukee, Racine and other large centers of population are located; that there is no pipe line leading into the State of Michigan, and only one pipe line leading into the city of St. Louis. This map discloses also other unoccupied areas located at no greater distances from the Panhandle gas field than the markets of several of the existing pipe line companies.

It is not necessary to cite authorities sustaining the general rule requiring the courts in cases where a statute, order or written document is subject to two constructions, one rendering it legal and the other illegal, so to construe it as to make it legal. Appellants admit the rule (appellants' brief, p. 41); but they contend, in effect, that this rule has no application unless it clearly appear that under the construction for which appellants contend the law would be unconstitutional. This Court has often held to the contrary.

In *United States* v. *Jin Feuy Moy*, 241 U. S. 394, 401; 60 L. E. 1061, 1064, the court said:

> "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score."

In another case the court said that a statute "must be construed with an eye to *possible* constitutional limitations, so as to avoid *doubts* as to its validity." *Lucas* v. *Alexander*, 279 U. S. 573, 577; 73 L. E. 851, 854.

In *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 390; 68 L. E. 748, 754, the court said:

> "It must be conceded that the construction thus sought to be put on the statute find support in some of its words, and also that, if it be so construed, a grave question will arise respecting its constitutional validity. But, as this court often has held, 'a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts on that score.'"
>
> We cite several other cases applying this principle in the footnote.[1]

It seems perfectly clear that the statute as construed by appellants would be unconstitutional for the reasons pleaded by appellees and found by the trial court. Certainly it could not be said that such construction would not create serious doubts as to its constitutionality.

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[1] *Harriman* v. *Interstate Commerce Commission*, 211 U. S. 407, 422; 53 L. E. 253, 264.
Knights Templar, etc. v. *Jarman*, 187 U. S. 197, 205; 47 L. E. 139, 145.
U. S. v. *Delaware & Hudson Co.*, 213 U. S. 366; 53 L. E. 836, 848-9.
Linder v. *United States*, 268 U. S. 5; 69 L. E. 819.
Lewellyn v. *Frick*, 268 U. S. 238, 251; 69 L. E. 934, 936.
Richmond Screw Anchor Co. v. *U. S.* 275 U. S. 331, 346; 72 L. E. 303, 308.
United States v. *LaFranca*, 282 U. S. 568, 574; 75 L. E. 551, 556.
Ann Arbor R. R. Co. v. *U. S.* 281 U. S. 658, 670; 74 L. E. 1098, 1104.

III.

The Statute and Orders Cannot Be Upheld on Any Theory of Protecting Correlative Rights.

1. HOUSE BILL 266 DOES NOT PURPORT TO CREATE ANY NEW RULE OF PROPERTY IN TEXAS OR TO RE-DEFINE THE CORRELATIVE RIGHTS OF OWNERS OF LANDS WITHIN A COMMON SOURCE OF SUPPLY OF NATURAL GAS AS THEY HAVE LONG BEEN DECLARED AND DEFINED.

2. UNDER THE ESTABLISHED LAWS OF TEXAS, THE CORRELATIVE RIGHTS OF PERSONS OWNING LANDS OR LEASES IN A COMMON SOURCE OF SUPPLY OF NATURAL GAS ARE THE RIGHT TO PRODUCE AND THE RIGHT TO USE ALL THE GAS THAT MAY BE PRODUCED FROM THEIR RESPECTIVE TRACTS, SO LONG AS SUCH PRODUCTION AND USE DO NOT CAUSE WASTE.

These points have been stated in the exact language of the trial court in its conclusions of law (R. 185).

It is a well-settled canon of construction that a statute will not be construed as changing the common law beyond what is expressly stated or necessarily implied, and, in doubtful cases, the presumption is that no change was intended. Where in a statute use is made of words or terms which have a definite and well known meaning at common law, as declared by the courts, it will be presumed that the terms are used in the sense in which they were understood at common law; and they will be so construed unless it clearly appears that they were not so understood. *Maltz* v. *Jackaway-Katz Cap Co.* (Mo. Sup. Ct.), 82 S. W. (2) 909; *Johnson* v. *Knipe*, 260 Pa. 504; *Elmore* v. *Brinneman*, 70 Ind. App. 222, 123 S. E. 248; *Irwin* v. *Rogers*, 91 Wash. 284, 157 Pac. 690; *Snyder* v. *McEwen*, 148 Tenn. 423, 256 S. W. 434.

In a Texas case, *Powell* v. *City of Amarillo*, 57 S. W.

(2) 233, the court, in construing the language of a statute, said:

> "At the time of the passage of this statute, a knowledge of the general rule and of the common law will be imputed to the Legislature."

Appellants (pp. 120-121, appellants' brief) admit that the statute was designed to protect property rights and not to change them; but the construction they put on House Bill 266 would radically change appellees' rights in that it would take from them their valuable right to produce and use their gas under the then established rules of property in Texas. It, therefore, becomes very important here to ascertain the rules in Texas fixing and declaring the correlative rights of owners of gas in a common reservoir in order to apply the rule of construction declared in the cases above cited, and thus arrive at what was meant by the expression "adjustment of correlative rights and opportunities" as used in the statute. Under the established rule of property in Texas, the land owner is the absolute owner of the oil and gas which is found within his land, although under the property rules in force in some States he has no title to the oil and gas in place, but only a right to acquire title upon reducing the mineral to possession. In Indiana the rule is that the owner, although entitled to bore wells for natural gas and oil, has no title to those substances as owner until they are actually reduced by him to possession. In Louisiana the rule seems to be that the minerals cannot be severed from the soil except by permission of the State. Texas, however, has never recognized such a limited ownership. From the time the question was first raised, it has been uniformly held that the land owner holds absolute title to the oil and gas in place as well as the oil and gas which migrates to formations underlying his land through drainage from other lands. *H. & T. C. Ry. Co.* v. *East*, 98 Tex. 146, 81 S. W. 279; *Herman*

v. *Thomas,* 143 S. W. 195; *Hunt* v. *State,* 48 S. W. (2) 466; *Stephens Co.* v. *Mid-Kansas Oil & Gas Co.,* 254 S. W. 290; *Henderson* v. *Railroad Commission,* 56 Fed. (2) 218; *Brown* v. *Humble Oil & Ref. Co.,* 83 S. W. (2) 935.

Although frequent reference is found in the cases to the term "correlative rights," it is not often that those using that expression undertake to say just what these correlative rights are. The Texas cases above cited have defined and settled those rights as they obtain in that State.

In *H. & T. C. Ry. Co.* v. *East,* the Supreme Court held that one adjoining land owner could not complain of the *amount* of water which his neighbor was producing from a well, even though his production was such as to cause the plaintiff's well to become dry.

In *Stephens Co.* v. *Mid-Kansas Oil & Gas Co.,* that court said:

> "If the owners of adjacent lands have the right to appropriate, without liability, the gas and oil underlying their neighbors' land, then their neighbor has the correlative right to appropriate, through like methods of drainage, the gas and oil underlying the tracts adjacent to his own."

In *Brown* v. *Humble Oil & Ref. Co.,* a recent case, the Supreme Court of Texas used this language, which is quoted by appellants at page 113 of their brief:

> "The rule in Texas recognizes the ownership of oil and gas in place, and gives to the lessee a determinable fee therein, * * * citing *Lemar* v. *Garner,* 121 Tex. 502, 50 S. W. (2) 769, and other cases.
>
> "Owing to the peculiar characteristics of oil and gas, the foregoing rule of ownership of oil and gas in place should be considered in connection with the law of capture. This rule gives the right to produce all of the oil and gas that will flow out of the well on one's land; and this is a property right and *it is limited only by the physical possibility of the adjoining land owner diminishing the oil and gas under one's land by the*

> *exercise of the same right of capture.* * * * Both rules are subject to regulation under the police power of a State."

Appellants italicize the last sentence, and apparently get great comfort from the observation of the court that these property rights in oil and gas are subject to regulation under the State's police power. Appellants are mistaken if they have the impression, as stated on page 113 of their brief, that appellees contend or ever contended that the State does not have such right. We recognize that the rights of owners under the Texas rule of ownership in place and under the rule defining the correlative rights of owners of oil and gas in a common reservoir have always been and are now subject to *valid* regulation by the State *in the proper exercise of police power.*

The point we make here is that the proposed regulations are not valid, and that it is not within the police power of the State to take from appellees gas and private marketing contracts and their transportation facilities and confer them on other persons so that such other persons shall have the means of exercising their undisputed right to produce and market their gas.

The pipe lines producing gas from this reservoir and, after transporting such gas from the place where it is produced, marketing the gas in pursuance of private contracts they themselves have negotiated, have done no more than exercise a right which belongs to every owner in the gas field. The gas in place under their leases is theirs and they have an inherent property right in this gas entitling them to produce, transport and market it, so long as it can be done without waste and so long as it can be done without interfering with the rights of others to do likewise. Every owner of a gas well in the field has the same right to produce, transport and market his gas. This is the correlative

right which the State has the power to protect under the authorities above cited. Nothing the pipe lines have done or are doing interferes with that right. But each owner must provide himself with the means of exercising this right. He cannot call upon the pipe line companies, nor can the State call upon them for him, to furnish markets for his gas and the means of transporting his gas to these markets. There can certainly be no co-equal, co-existing or correlative right, to use all the terms employed by appellants in their brief, if the owner of one gas well must furnish the pipe line and the market for the transportation and marketing of other owners' gas, while the other owners are relieved of any responsibility to provide a means of transportation for handling their gas. Instead of being on a correlative or co-equal basis, the appellees are made to take upon themselves tremendous burdens for the benefit of others; and the others are permitted to obtain all the benefits of the investments of appellees in pipe line facilities and in the latter's private marketing contracts, without making the slightest contribution thereto in time, skill or money.

The correlative rights of those owning interests in a common reservoir of gas are not peculiar to that character of property. Under the early common law men acquired and owned correlative rights in common property. In the *common of pasture* several persons owned in common the right to feed beasts on the lands belonging to all, but it was recognized that the right of one owner desiring to feed his beasts on the common land could not be defeated by the circumstance that another owner had no beasts to enable him to exercise his correlative right of pasturage.

There was the *common of estovers,* under which several persons owned a common wood or forest, with the correlative right in common to take wood for domestic fires, for

repairs to houses and fences, for making or repairing implements of husbandry. If one of the owners needed fire wood or needed timbers to repair his house, his fence or his plow, he had full right to go out into the common woods and provide himself with the timber needed for his uses, nor was his right defeated by the circumstance that some of the other owners maintained no homes and therefore needed no fuel for their fires, and had no houses, fences or implements to repair. Neither was the first owner's right to take and use wood from the common forest defeated because some other owner having a home and needing a fire had no wagon and team with which to haul wood for his own uses. The exercise of A.'s right to use wood could not be burdened with a condition that he must first lend B. his wagon and team in order that the latter might likewise take wood.

So, one of the owners in the *common of piscary,* which gave all the right to take fish from a body of water owned in common, could not be denied his right to take fish from the waters merely because one of the other owners had no desire to go fishing or had not the nets or other equipment with which to take fish.

Of course, one of the common owners would not be permitted to destroy the fish in a common pool by blasting or by poisoning; for in that case his method of taking the fish would be unusual and would destroy the correlative rights of the other owners. For the same reason one of the owners of a common forest would have no right to go out and set fire to the forest merely because his co-owners were not using it at the time. In other words, the owner of an interest in a common fishery or a common forest would have no right to waste the common property.

Although it has been frequently held that a common right to the use of water is a right to a reasonable use

thereof, it has never been held by any court that one of those having such common right may not exercise his right if there be others having the same common right who are so circumstanced as not to be in position to exercise their right.

A. has a perfect right to enter the railroad business. Let us assume that he conceives a laudable desire to operate a railroad between the cities of Washington and New York, but he has neither railroad right of way, road beds nor rolling stock with which to engage in that business. He has no right to demand of the Pennsylvania Railroad that it furnish him with a railroad track, with the attendant stations, locomotives, box cars and coaches necessary to engage in the great business of railroading merely because he is without this character of equipment and, therefore, is not able to exercise his right to engage in the railroad business. The Pennsylvania Railroad Company is subject to regulation as a common carrier under the police power of the State; but no court would hold that an order that would operate to compel that company to furnish the equipment to put A. in the railroad business would be a valid regulation in the proper exercise of police power. In refusing to furnish such equipment it would in no sense violate A.'s unquestionable right to engage in the railroad business.

A. and B. own equal rights to use the public highway. Both may have a desire to go from the city of Washington to the city of Baltimore. One has an automobile and is in position forthwith to exercise his right to make the journey. The other has no car. Can he force the former to allow him the use of his automobile in order that he may exercise his right to drive over the highway from one city to the other?

These are commonplace illustrations; but there is no dif-

ference in principle in the illustrations used than in the situation of a number of persons, each owning gas wells in the Texas Panhandle, some of whom, like appellees, have provided themselves with pipe lines and have negotiated markets, while others, from lack of desire to do so or from lack of means, have failed to provide themselves either with markets or transportation facilities. The latter have no legal right to demand of the former that they divide their private marketing contracts and their transportation facilities, to the end that those having none may have the means to exercise their right to produce and market their gas. Nor can appellees' right to produce and market their gas be made to depend on their providing markets and pipe lines to such other owners.

What superior equity does the owner of a gas well have over the owner of a piece of land within the common reservoir who has not had the initiative, the inclination or the means to drill a gas well on his land? If appellees, who have bought leases, drilled wells thereon and constructed pipe lines, compressor stations and other necessary facilities for transporting gas to distant points, and who have negotiated and entered into marketing contracts for the sale of their gas at great cost in money, time, initiative and skill, can be made to divide these markets and these facilities with those who own wells in the field but who are without facilities to transport and market their gas, why then could not appellees, in addition to furnishing markets and transportation facilities, be required also to drill wells on the undrilled leases of other owners? There is absolutely no difference in the principle involved. The owner of the undeveloped leases is without a well and is, therefore, not in position to exercise his right to produce his gas. The other owner, having a well but not having provided himself with a market or a means of transporting his gas to market,

is not in position to exercise his right to transport and market his gas. But neither is deprived of his right to produce, transport and market his gas by the circumstance that appellees have made the investments and the sacrifices which put them in position to exercise their right to produce, transport and market their gas. Since the appellees are violating no right of any other owner to produce, transport and market his gas, a "regulation" that forces appellees to furnish the other owners with the facilities which would enable such owners to exercise the rights which appellees are already in position to exercise cannot be justified on the theory that it is necessary to protect the correlative rights of all the owners.

In their discussion of this point and throughout their brief, appellants assume that appellees and those similarly situated are taking and will take the sweet gas in the common reservoir which belongs to others. The record is conclusively to the contrary, as shown by the facts already discussed and to be discussed later in this brief; but, proceeding on this assumption, appellants cite *Ohio Oil Company* v. *Indiana*, 177 U. S. 190; 44 L. E. 729. In that case this Court was considering a statute which provided that it should be unlawful to permit the flow of gas or oil from a well to escape into the open air, without being confined within the well or proper pipes or other safe receptacle, for more than two days. In using the language quoted, therefore, the Court was discussing a taking of gas and oil at such rate and under such circumstances as that the common property was being *wasted* and the other owners thereof were thus being prevented from exercising their right to take and use their proper proportion of the oil and gas in the reservoir. In that case the offenders were violating and interfering with rights of other common owners by destroying the thing owned in common. Appellees claim no right to

do this. They claim only the right to take and use lawfully the gas which they own in the common reservoir.

In utter disregard of the facts conclusively established by this record, appellants, on page 116 of their brief, assert that if the "ratable production" features of the statutes are ineffective, it necessarily will follow that all of the sweet gas, including the gas owned by others, that is produced in the Panhandle gas field will eventually be produced through the wells of the companies with pipe line affiliations. In another place in this brief we shall show that appellees and those similarly situated will never be able to take their own just share of the total reserves of gas in the Panhandle; but if the facts were as stated by appellants and the pipe lines would ultimately produce through their wells all the sweet gas in the common reservoir by reason of the circumstances that the other owners failed to drill wells, to develop markets and to construct transportation facilities to enable them to exercise their rights in the premises, it could not be said that in producing such gas appellees would violate any correlative right of the other owners.

The trial court did not hold, and appellees do not contend, that the rule of capture and the other rules entering into the definition of the correlative rights of owners of gas in a common pool are superior to and outside the orbit of the police power, giving a perpetual right to drain neighboring lands, as stated by appellants on page 118 of their brief. We do contend, and the trial court held, that House Bill 266 does not modify the rule of capture or the other rules defining these correlative rights, and that the statute, as construed by appellants, and the orders issued by the Commission cannot be upheld as valid police regulations. In the opinion (R. 158) the trial court observed:

> "By force of this doctrine, it may be that by a complete, a comprehensive scheme which, consistent with due process, considers and has due regard for the

> rights and equities of all, the Legislature may be able to provide by law for an equitable ascertainment, partitioning and fixing of them, so that each could take only what was thus determined to be his own. We do not say that it cannot do this. We say merely that it has not done so. We say that House Bill 266 cannot be said to have either this object or this effect."

Beginning on page 45 of their brief and continuing through several pages, appellants repeatedly refer to and quote from *Ohio Oil Company* v. *Indiana, supra.* Remembering that this case had to do with wastage by one of the common owners, and not with lawful and reasonable use such as that now being exercised by appellees, may we point out that a placing of the italics where they really belong in the quotations so often referred to discloses that appellants have wholly misinterpreted the effect of that decision? We quote:

> "Hence it is that the legislative power, from the peculiar nature of the right and the objects upon which it is to be exerted, can be manifested for the purpose of protecting all the collective owners by securing a just distribution, to arise from the enjoyment, by them, of *their privilege* to reduce to possession, and to reach the like end *by preventing waste.*"

Appellants quote from *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229, 55 L. E. 716. It is of interest to note that near the middle of this quotation (page 48 of appellants' brief) is an ellipsis indicating that some of the language of the court was omitted. This language turns out to be a parenthetical expression: "against a wasteful use the statute was directed." This case is authority for the position of appellees. In the next succeeding paragraph to that quoted by appellants as above stated, the court said:

> "On the other hand, as to gas and oil the surface proprietors within the gas field all have the right to reduce to possession the gas beneath. They could not be absolutely deprived of this right which belongs to them without a taking of private property."

This is exactly what results from the statute and orders here attacked as applied to appellees. To the extent that they are required to divide their markets, they will be absolutely deprived of their right to take their own gas and transport it through their own transportation facilities to these markets. Under the facts of this case this is not a mere deferring of the right; for, while they are using their pipe line facilities to transport the gas of other owners to market and fulfilling their limited market outlets with the gas of other owners, their own gas will be drained away to the low pressure areas and forever lost.

The *Walls* case is clearly not in point for the reason that it, like the *Ohio Oil Company* case, had to do with a statute prohibiting wasteful use of gas. The language quoted must be read in the light of this circumstance. That it has no application to the case at bar is clear when it is remembered that appellees are producing their gas without waste and using it for purposes that are admittedly lawful. Those affected by the statute in the *Walls* case would have soon dissipated the reservoir of gas from which they were producing, thus depriving the other owners of their right to take and use gas for non-wasteful purposes at a later time. Appellees are not taking and have never taken more gas than they had a right to take under the existing rights of the owners of other gas wells, and they have never at any time prevented similar taking and use by the owners of neighboring wells.

In the *Bandini* case the court was dealing with a regulation prohibiting the unnecessary production and wasteful use of gas in connection with the production of oil. The language quoted from the opinion of this Court is, of course, appropriate to the facts of that case; but it has no application to the facts of the case at bar. It cannot be gainsaid that if one oil producer produce and waste exces-

sive quantities of gas in connection with oil production, as has been done to the quantity of 2,000,000,000,000 cubic feet in the Texas Panhandle, the gas energy which brings the oil to the well is destroyed and the owners of neighboring oil wells will suffer losses by reason of this unnecessary waste by being deprived of their right in due course to utilize this gas energy in the production of oil in an orderly manner. The power of the State to protect this right by preventing the waste we have always conceded.

Russell v. *Walker*, cited by appellants (page 54 of their brief) is another case in which a statute and orders prohibiting waste in the production of oil and gas were upheld as valid police measures.

The *Henderson case*, on which appellants rely, is another wastage case. It had to do with those provisions of House Bill 266 which prohibited the burning of sweet gas in the manufacture of carbon black. It prohibited a wasteful usage of gas suitable for use as light and fuel. The italicized portion of the language quoted is but a reiteration of the holding of the trial court in the case at bar and of the contention of appellees throughout the record, that the State may prohibit a *wasteful* use in order to protect other owners against a destruction of their property rights in the common reservoir. The record shows that natural gas cannot be produced and stored or produced in quantities beyond the developed market outlets. If one owner be permitted to produce enormous quantities of gas and burn it into carbon black, the other owners in the field are deprived of their right to go out and develop markets for gas and, after providing a means of transportation, to produce their gas and dispose of it in such markets.

We confidently assert that there is no reported case upholding a limitation of production of oil, gas or percolating water merely because some producers have no market

for their production or means of using the same. In every instance the restriction has been upheld as a valid exercise of the police power to prevent waste or to prevent unusual or extraordinary use that would operate to destroy the common property.

3. THE STATE HAS AN INTEREST IN THE ACCOMMODATION OF CORRELATIVE RIGHTS, BUT NOT IN PROVIDING THE MEANS THROUGH WHICH THE OWNERS MAY EXERCISE THEIR RIGHTS.

4. THE RIGHT OF APPELLEES NON-WASTEFULLY TO PRODUCE AND LAWFULLY TO USE AND MARKET THEIR GAS IS VESTED, AND THEY CANNOT BE DEPRIVED OF THIS RIGHT WITHOUT A TAKING OF PRIVATE PROPERTY.

On page 58 of their brief, appellants begin a discussion under the caption, "The State has an interest in the accommodation of correlative rights in various types of property." We have no quarrel with the caption; but the principle stated is absolutely without application to the present case. Appellants assume that all owners have a right to a market and marketing facilities, whether they have provided themselves with same or not; but the law is to the contrary. The underlying principle is as old, at least, as the parable of the ten virgins—the five wise ones who had lamps trimmed and filled with oil, and the five foolish ones who also had lamps but who had failed to trim and fill them with oil. The latter clamored for a division of the former's oil; but the Bridegroom answered "nay" and denied them admission to the wedding.

The law invites all owners to produce their gas without waste; and the constitution protects them in their right to do so. But the constitution will not permit the Legislature and the Commission to require other owners, who have

provided themselves with equipment to exercise these rights, to provide other owners with similar equipment.

Of course the State is, and should be, interested in protecting every owner's *right to produce* his gas in a non-wasteful manner and his *right to use* his gas for lawful purposes. Every owner had both these rights before the statute and orders attacked were enacted and promulgated. Do the statute and orders protect appellees in these rights? Far from protecting them, the statute and orders operate to deny appellees these rights; and at the same time they necessarily operate to coerce appellees into providing the owners of other wells with markets and facilities for transporting their gas to their markets. Do the statute and orders protect the owners of other wells in the enjoyment of these rights? No; because they already had these rights, and appellees and those similarly situated were in no sense violating them. The statute and orders confer on the owners of other wells substantial interests in appellees' markets and pipe line facilities, which they did not have because they had not the inclination, the initiative or the financial resources to exercise their unquestioned right to acquire for themselves markets and marketing facilities—the means of exercising their right to produce and use their portion of the gas in the common reservoir.

The cases cited by appellants do not sustain the contentions of appellants. The law announced in these cases is good law and the principles announced are sound; but they have no application to the present case.

Bacon v. *Walker,* 204 U. S. 311, 51 L. E. 499, appellants' first case on this point, involved a statute of the State of Idaho prohibiting persons owning sheep from permitting them to graze within two miles of the possessory claims or dwelling houses of other people. It is a matter

of common knowledge that sheep and cattle cannot be grazed on the same lands or watered at the same watering places. The scent characterizing sheep is offensive to cattle and cattle will not feed where sheep graze or drink where sheep take their water. If sheep be grazed within two miles of the residence of an owner of cattle, the latter will be deprived of his right to graze his cattle within two miles of his home. The State of Idaho could prohibit the grazing of sheep on any portion of its public lands; for its interest in its own public domain is proprietary and not merely governmental, as is the interest of the State of Texas in protecting its natural resources. It could, therefore, place any limitation it might see fit in extending its use for the grazing of sheep. It will be noted that in that case the court specifically pointed out that the statute did not operate to prevent one from grazing sheep on his own land, even though within two miles of another's residence.

Their next case, *Lindley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 55 L. Ed. 369, is another waste case. The landowner was engaged in collecting and vending as a separate commodity the carbonic acid gas obtained in mineral water existing in a common underground reservoir. In order to obtain a comparatively small quantity of carbonic acid gas he was taking enormous quantities of water, extracting the gas therefrom, and allowing the water to go to waste. The act under review forbade this practice and was upheld by the court as a proper exercise of the police power to prevent the taking of unnatural quantities of water from the common source of supply and wasting them, to the injury or impairment of rights of other proprietors. There is nothing in that case that would authorize the Legislature to deprive appellees of the perfectly natural use to which they are applying their gas in producing and marketing it for light and fuel purposes.

Hathorn v. *Natural Carbonic Gas Company,* 194 N. Y. 326, 87 N. E. 504, involved the right of an owner to use pumps to increase the natural flow of percolating mineral waters and gas, and thus obtain a greatly increased proportion of a common supply at the expense of his neighbors, for the purpose of supplying a public market for the gas and turning the water to waste. It thus appears that this is another statute to protect the owners against the destruction of their rights by one owner who is wasting the common property.

Appellants cite a number of cases on page 62 of their brief. A reading of these cases will disclose that they are in no sense authority for the contention of appellants.

Bassett v. *Salisbury Mfg. Co.,* 43 N. H. 569, 82 Am. Dec. 179, involved a consideration of the liability of one maintaining a dam across a stream so as to obstruct the natural drainage from plaintiff's land above the dam. We quote from the opinion of the court some of the language bearing on its views of correlative rights of common owners:

> "We need not argue that some rights exist; that the owner of the land may make some use of the water in it; that he may do some acts that will affect to some extent the drainage; that a well may be dug, under some circumstances, although it will draw water by percolation from a watercourse, from adjoining land, or even from the well of a neighbor. If the views we have expressed are correct, they have already indicated the sole ground of the qualification of the landowner's right in such cases, and that is, as in certain cases of watercourses, the similar rights of others; and this will, of course, determine the extent of the qualification, which, as in the analogous cases suggested, and for the same reasons, is the rule of reasonable use—of a reasonable exercise of one's own right. * * * The right of each is only to a reasonable user or management; and whatever exercise of one's right or use of one's privilege, in such case is, under all the circumstances, and in view of the rights

> of others, such a reasonable user or management, is not an infringement of the rights of others; but any interference by one landowner with the natural drainage, injurious to the land of another and not reasonable, is unjustifiable. Every interference by one landowner with the natural drainage, actually injurious to the land of another, would be unreasonable, *if not made by the former in the reasonable use of his own property.* Although the plaintiff's land was not situated upon the river, yet if the defendants, by means of their dam, obstructed its natural drainage to the actual injury of the plaintiff, they are liable, *unless the obstruction was causd by the reasonable use of their own land or privilege.*"

Another case cited by appellants, *Meeker* v. *City of East Orange,* 77 N. J. L. 623, 74 Atl. 379, involved the withdrawing of enormous quantities of percolating waters for the purpose of sale. The ordinary use of this water was for agricultural purposes, and the one owner, who was withdrawing it for an unusual purpose, was depriving the other owners of its agricultural value. The court held that underground waters may not be withdrawn for distribution or sale if it therefrom result that the owner of adjacent and neighboring land is interfered with in his right to the reasonable use of subsurface water, or if his wells are materially diminished in flow, or his land rendered so arid as to be less valuable for agricultural, pasturage, or other legitimate use. The point decided, therefore, was that one owner would not be permitted to make an unusual disposition of water belonging to all, and thus deprive the other owners of their right to use it for ordinary purposes. It is readily seen that the principle announced in that case has no application to the present case; for the use appellees are making of their gas is not only an ordinary use, but a use expressly approved by the statute.

The same principle was applied in *Forbell* v. *City of New York,* 164 N. Y. 522, 58 N. E. 644, in which it was held that

one owner was not entitled to pump and make merchandise of large quantities of water, with a resulting exhaustion from all the region thereabout of the natural supply of surface water, thus preventing the raising of crops to which the land was peculiarly adapted. The use was not the ordinary but an extraordinary one.

The other case was *Katz* v. *Walkinshaw*, 141 Cal. 116, 70 Pac. 663. We note that appellants failed to discuss the holding of the court in that case on motion for rehearing, reported in 74 Pac. 766, in which the court discussed the identical point here under consideration in the following language:

> "If a party makes no use of the water on his own land, or elsewhere, he should not be allowed to enjoin its use by another who draws it out or intercepts it, or to whom it may go by percolation, although perhaps he may have a right to a decree settling his right to use it when necessary on his own land, if a proper case is made."

This rule has been adopted by the Courts in Texas. In *Parker* v. *El Paso County Water Imp. Dist.*, 116 Tex. 631, 297 S. W. 737, the Supreme Court said:

> "If the plaintiff owns a ditch, he cannot be deprived of that property, nor its use, without consent or grant, or some form of due process.
>
> "The improvement district cannot take that water and distribute it without his consent, provided he desires to and does use it. The right of the riparian to his just proportion of his riparian water which flows by his land is an incident to his ownership of the land, and is a part and parcel of the land. It is property within the constitutional guaranties.
>
> "If the plaintiff in error does not take his proportionate part of the riparian water and use it, then that proportion to which he is entitled, so long as he does not take it, under the modified rules of the common law applicable to the arid or semi-arid states, increases the residue of riparian water in the river available for the use of others."

In *Eckel* v. *Springfield Tunnel & Development Co.*, 262 Pac. 425, the court held that since there are co-equal rights in a supply of water, reasonable use does not mean all the water that may be reasonably beneficial regardless of needs of others, but only a reasonable share thereof, if there be not enough water to supply the needs of all. This is just a re-announcement of the well settled law governing rights of riparian owners. Of course the owner whose land was above that of his neighbor could not appropriate all the water, and thus deprive the owner of the land lower down the creek of his rightful portion. Here the offender was by his appropriation depriving his neighbor of his *right* to take a part of the natural flow of water. There is no such situation obtaining in the Texas Panhandle. The need of the owners for whose benefit the statute was enacted and the orders passed is not more gas. Their need is a market, and until they have a market they have no need for the gas. The fact that appellees are taking their own gas and disposing of it to their private markets is interfering with no need of other owners or any right of other owners.

Appellants cite *Ex Parte Elam*, 6 Cal. App. 233, 91 Pac. 811, and *Eccles* v. *Eccles*, 23 N. M. 235, 167 Pac. 726. The *Elam* case involved a penal statute forbidding the *waste or unnecessary flow* of water from an artesian well, and prescribing certain *uses* therefor. The latter case involved a statute which prohibited an owner's allowing an artesian well to become and remain out of repair so that water would unnecessarily be permitted to *flow to waste*.

None of these cases holds that where one owner has need for water and the other has no such need, the one having the need may be prevented from using his water unless he will provide a means of use or a need for the other owner. On the contrary, the clear effect of the holdings is that, under the reasonable use doctrine, an owner having no use

for his water cannot prevent its use by other owners for lawful and proper purposes.

In this connection appellants cite *Head* v. *Amoskeag Mfg. Co.*, 113 U. S. 9, 28 L. E. 889. This case involved a statute of New Hampshire authorizing the erection of mill dams on non-navigable streams, even though the erection of the dam had the effect of overflowing, draining or injuring the land of other persons, providing, however, for the payment of damages to the persons damaged. The court pointed out that the law specifically provided an adequate remedy, by trial *in the regular course of justice,* for the injuries suffered. The point was specifically made by the court that this provision for equitable compensation distinguished the case from the leading case of *Pompelly* v. *Green Bay Co.*, 13 Wall. 166, 20 L. E. 557, in which it was held that statutory authority for the construction of a dam was no defense to a suit for damages, where the statute contained no provision for an ascertainment of damages before constructing the dam.

The holdings in *Wurtz* v. *Hoagland,* 114 U. S. 606, 29 L. E. 229, and *Fallbrook Irrigation Dist.* v. *Bradley,* 164 U. S. 112, 41 L. E. 369, have no application to the present case. They are cases involving the right of the Legislature by statute to make provision for public improvements, and are comparable to statutes providing that the owners of property along public streets may be required to construct sidewalks, curbs and paving. The underlying doctrine of this class of cases is well stated in the *Wurtz* case, in which it is said, in substance, that the State may provide for an improvement common to all concerned, at the common expense of all; but this doctrine has its limitations. A drainage district, for instance, though a subdivision of the government, may not be arbitrarily formed, taking into its limits lands not in need of drainage solely for the purpose of collecting taxes to be expended in the draining of other

lands within the district. *Myles Salt Co.* v. *Board of Commissioners,* 239 U. S. 478, 60 L. E. 392. If the public improvement cases are in point, they support, not appellants' contention, but the position of appellees, that other owners are not entitled to participate in the beneficial results that may be obtained from their pipe lines and markets, in the acquiring of which these other owners have not participated. The effect of appellants' contention is that other owners have a correlative right to participate in all the benefits arising from appellees' private investments, without a corresponding duty on their part to participate in these investments.

The party wall cases, *Jackman* v. *Rosenbaum Co.,* 260 U. S. 22, 67 L. E. 107, and *Swift* v. *Calman,* 102 Ia. 206, 71 N. W. 233, are likewise without application.

The *Jackman* case involved a statute of the State of Pennsylvania going back to 1721, sanctioning a custom introduced in the State with the coming of the settlers led by William Penn. The statute had become a rule of property in Pennsylvania long prior to the adoption of the Fourteenth Amendment. Under those circumstances, this Court held that the Fourteenth Amendment had no application to the statute.

In the *Swift* case, the court held that the party wall was built with the knowledge and consent of the defendant and with the promise on his part to pay half the cost as soon as he should use it. In its discussion of the provision attacked as being in violation of the Fourteenth Amendment (a provision entitling an adjoining owner to build a party wall extending not to exceed nine inches over the line of his neighbor without the consent of the latter), the Court said:

> "That it comes close to the line must be conceded; but the fact that it has existed for more than forty years and has been generally used and recognized as

> valid and enforcible is strong reason for sustaining the act. * * * The adjoining proprietor is not bound to contribute to the expense of the wall. No burden is cast upon him unless he makes such use of it as to indicate that he desires to use the wall in common.''

It is apparent that the discussion of the constitutional question is *obiter dictum,* since the court disposed of the case on the point that the contract between the parties settled their rights.

It is clear that appellants would confine appellees' rights in their gas leases and wells to their ownership in place, entitling them to pay taxes on this gas but not entitling them to protect their ownership by reducing same to possession on the surface. They would limit appellees' property rights in their gas by asserting that the Legislature and Commission can restrict the production from their wells to less than their present market outlets, and thus deprive appellees of their opportunity to reduce to actual possession as much of their gas as their market outlets would permit. By no means should appellees be permitted, say appellants, in effect, to enforce the law of capture and take any gas that may be drained from the properties of their neighbors. That rule of law is one available only to those whom appellants have made the special objects of their interest—those who have not exercised the diligence and expended the funds necessary to provide themselves with facilities through which to exercise their right to produce, transport and market gas for lawful uses. They cannot be bothered, and they say the court cannot be bothered, by the circumstance that, under their interpretation, the statute and orders will operate to shackle and hold appellees, by restricting their right to produce, while the latter's gas migrates from beneath their lands to the wells of those cooperating with appellants in the attempt to force appellees to buy the gas of other owners. Nor

does it make the slightest difference to appellants that appellees and others similarly situated are also deprived of their markets and the use of their pipe lines, and that the real design back of the statute and orders is to accomplish this result so that others may enjoy their benefits.

A right of property is not subject to change by legislation. A statute taking away a right of property without due process is void. *Munn* v. *Illinois*, 94 U. S. 113, 24 L. E. 77.

It is well settled that a right to use is a right of property. Necessarily, a rule defining rights of use is a rule of property. This right, of course, is always subject to the proper exercise of the police power. The right to produce and use oil and gas is subject to proper regulation for the prevention of waste; but, in the absence of waste, any attempt to restrict or limit the settled right of appellees to produce and market their gas for lawful purposes is a taking of private property without due process of law.

This Court has in several cases recognized this absolute right of reasonable use, and held that even in those States where the landowner does not have absolute ownership in place, the right of use is protected by the due process clause.

Thus, in *Ohio Oil Company* v. *Indiana, supra*:

> "On the other hand, as to gas and oil, the surface proprietors within the gas field all have the right to reduce to possession the gas and oil beneath. They could not be absolutely deprived of this right which belongs to them without a taking of private property."

The only limitation upon that right recognized in the case last cited was that one could be required to refrain from wasteful production.

We have already pointed out that in *West* v. *Kansas Natural Gas Co., supra*, this Court, referring to the *Ohio Oil Company* case, held that the surface owners of the soil,

owners of the gas as well, could not be deprived of their right to reduce it to possession without the taking of private property.

That the right discussed is a vested right was recognized by this Court in *Sterling* v. *Constantin,* 287 U. S. 378, 77 L. E. 375, in which it said:

> "'The existence and nature of the complainants' rights are not open to question. Their ownership of the oil properties is undisputed. Their right to the enjoyment and use of these properties, subject to reasonable regulation by the State in the exercise of its power to prevent unnecessary loss, destruction and waste, is protected by the due process clause of the Fourteenth Amendment.'"

Eaton v. *Ry. Co.* (*N. H.*), 12 Am. Rep. 147, announced the principle we invoke in an opinion written more than fifty years ago. The court said:

> "If the right of indefinite use is an essential element of complete ownership, whatever physical interference annuls this right takes 'property'—although the owner may still have left to him valuable rights (in the article) of a more limited and circumscribed nature, he has not the same property that he formerly had. Then he had an unlimited right; now he has only a limited right. *His absolute ownership has been reduced to a qualified ownership.* * * * The constitutional prohibition must have been intended to protect all the essential elements of ownership, which make property valuable. Among these elements is, fundamentally, *the right of use,* including, of course, the corresponding right of excluding others from the use. A physical interference with the land which substantially abridges that right takes the owner's property. * * * The principle must be the same whether the owner is wholly deprived of the use of his land or only partially deprived of it. * * * Taking a part is as much forbidden by the constitution as taking the whole. The difference is only one of degree; the quantum of interest may vary, but the principle is the same."

Applying this well established principle, appellants can-

not be heard to say that appellees have the right to produce a portion of their gas and transport it to market; for under the findings of the trial court (R. 178) supported by the overwhelming evidence, it appears that very large quantities of gas had migrated from the reserves of the pipe lines, including the reserves of appellees, to the low pressure areas in and around the oil fields on the northeast slope of the reservoir, and that without regard to the rate of withdrawal in the existing areas of low pressure, the migration of gas from the reserves of the pipe lines to those areas of low pressure will continue over a long period. In its conclusions of law the trial court held (R. 185) that the necessary operation and effect of the orders is to prevent appellees from protecting themselves, to the extent that they may be able to market their gas, against the enormous losses by drainage now occurring and which will continue to occur from their leases, located in areas of high pressure, to existing low pressure areas. But for the operation of the statute and orders, appellees and those similarly situated would be able to protect themselves against this drainage up to the quantity of their market outlets; but under the operation of the statute and orders they will be deprived of this right by exactly the quantity they would have to purchase from others, amounting in the case of appellee Texoma to approximately 15,000,000 cubic feet of gas daily, and in the case of appellee Consolidated to about 17,000,000 cubic feet daily, which is about 68 per cent of its total market outlet.

In *Stephens Co.* v. *Mid-Kansas Oil & Gas Co., supra,* the Supreme Court held that the ownership of the gas and oil in place means the exclusive right to possess, use and dispose of gas and oil.

The principle under discussion is applied also in cases involving rights of riparian land owners, to some of which cases we refer briefly at this point.

In *Neilson* v. *Sponer*, 46 Wash. 14, 89 Pac. 155, the Supreme Court of Washington held that a statute which provided that a person upon whose land seepages or spring waters first arise shall have a prior right to such waters was unconstitutional as to riparian owners upon streams flowing from such springs whose lands were patented prior to the enactment. The holding was based on the ground that the statute constituted an attempt to change the right of use, and was therefore a deprivation of property without due process of law.

In *Yates* v. *Milwaukee*, 77 U. S. 497, 19 L. E. 984, the right of a riparian owner to build a wharf was under consideration. The court said:

> "This riparian right is property and is valuable, and though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and if necessary that it be taken for the public good, upon compensation."

The same principle was applied in *Illinois* v. *Economy Light & Power Co.*, 234 U. S. 497, 58 L. E. 1429. A nonnavigable stream had been made actually navigable. The legislature sought to change the rights of riparian owners from the rights they had while the river existed in its natural state to rights accorded riparian owners of land along navigable streams. To that end the legislature declared the stream navigable. In holding the attempt ineffectual, the court said:

> "The declaration could not affect the rights of defendant in error, they being protected by the constitution of the State, which forbids property being taken for public use without compensation being previously made."

In *Crawford Co.* v. *Hathaway* (Nebr.), 93 N. W. 781, the court held that the right of a riparian owner as such to

the water of a stream running through or by his land is property, and, when vested, can be destroyed or impaired only in the interest of the general public and only upon full compensation.

This Court held in *Sinclair* v. *Livingston,* 23 Wall. 46, 23 L. E. 59, that the riparian right to future alluvion is a vested one, an inherent and essential attribute of the original property.

The Supreme Court of Texas, in *Manry* v. *Robison,* 56 S. W. (2) 438, held that the rights of land owners to land created by alluvion as well as that uncovered by reliction and abandonment of river beds were vested property rights and not mere "rules of law."

This principle was discussed by the Supreme Court of New Mexico in *Yeo* v. *Tweedy,* 286 Pac. 970. The legislature had enacted a statute declaring all waters found in underground streams, channels, artesian basins, etc., to be public waters belonging to the public and subject to appropriation for beneficial uses. The court in a lengthy discussion pointed out that, in that State, the common law property rule governing property rights in percolating waters had never been adopted, but in the opinion said:

> "If, as appellees contend they had, as incident to their ownership of the land, a vested property right in the corpus or usufruct of the underlying waters, various provisions of the State and Federal constitutions obviously challenge the power of the legislature to take or impair such rights in favor of others whose situation is similar except in the matter of earlier appropriation to beneficial use."

It is thus clear that the principles governing the rights of riparian owners sustain the position of appellees in this case.

In *Haskell* v. *Cowhan,* 187 Fed. 403, the court held that an owner who, by virtue of his ownership of the land or

of mining leases thereon, has a vested right to draw, by means of wells or pumps, natural gas from beneath the surface, is the owner of a valuable property which the State cannot take from him without compensation.

In *Warner Quinlan Asphalt Co.* v. *Carlisle*, 144 N. Y. S. 70, the right to market a person's property was stated in this language:

> "In all the authorities which define what property may not be taken from a citizen without due process of law, the free right to market his property is recognized as one of the rights protected by the constitution."

Under the authority of these cases, we respectfully submit that at the time House Bill 266 was enacted, appellees and others similarly situated, in common with each other land owner in the Panhandle gas field, owned an absolute fee title to the gas under their lands in place and such gas as might come into the formations underlying their lands by drainage from other land. The right to produce this gas in a non-wasteful manner and to use it for lawful purposes or sell it for lawful uses was a necessary incident of ownership and constituted a vested private property right in the gas itself. Admittedly, the law has not been changed by House Bill 266, but appellants say that the effect of House Bill 266 is to limit and restrict this necessary incident of ownership, this absolute property right in their gas, with the result that appellees and those similarly situated can produce only a portion of the total quantity of gas which they can produce without waste and market for lawful purposes, to the end that others may share in the benefits of the markets and marketing facilities which appellees have provided for themselves in order that they may exercise such right of ownership. This in its practical application means that appellees cannot go into the centers of population and develop potential markets into

actual markets by committing themselves to sell and deliver gas from their own property in such manner as to bind them; for if some other market which is being supplied from the same field shall for any reason be reduced, appellees will have to cut down the production from their own wells in adjusting the total production from the field to the total market outlets. Manifestly, this is a serious limitation on the property rights which appellees have in the gas underlying their leases.

5. THE NECESSARY OPERATION AND EFFECT OF THE STATUTE AND ORDERS IS TO PREVENT APPELLEES FROM PROTECTING THEMSELVES AGAINST ENORMOUS LOSSES BY DRAINAGE FROM THEIR LEASES TO THE EXISTING AREAS OF LOW PRESSURE, TO THE EXTENT THAT THEY SHALL BE ABLE TO MARKET THEIR GAS; AND THIS RESULTS IN A TAKING OF GREAT QUANTITIES OF APPELLEES' GAS WITHOUT DUE PROCESS AND WITHOUT COMPENSATION.

As stated in the footnote on page 7, we have prepared a copy, on a smaller scale, of the pressure map prepared by the witness Peterson (Exhibit No. 5), the original of which was forwarded to this Court as a part of the record, which is placed in the pocket inside the last cover page of the brief, and we think it would be very helpful in the consideration of this point if the Court will lay this copy before it for reference as it reads our observations under this point.

The pressure map to which we have just referred reflects the whole story. It shows beyond question that appellees and the other pipe line companies have sustained and will continue to sustain enormous losses of gas from their reserves as a result of the existing low pressure areas shown along the northeastern flank of the field or reservoir.

The trial court found that, due to underground natural physical conditions and the drilling of wells, there is ex-

tensive communication between the different saturated strata, allowing the migration of gas from one stratum or layer to another, as well as up and down structure in the same stratum (R. 169. The Court will find it very helpful in this connection to examine Original Exhibit No. 15, which portrays a cross section of the field showing the relation of these various strata); that there is no physical barrier between those portions of the formations producing sweet gas and sour gas respectively, and there is free migration of gas from the sweet gas area to the sour gas area and vice versa (R. 170); that the area productive of free sweet gas embraces 904,000 acres, of which 723,000 acres is in the West Panhandle field and 181,000 acres in the East Panhandle field; that the sour gas area, which is all in the West Panhandle field, embraces 270,000 acres (R. 170); that during the early history of the field no value was placed on the gas for the reason that there was no outlet for any substantial quantity; that the development was intensified in and around oil producing areas, in which deplorable waste of gas occurred in connection with the production of oil during these earlier years, resulting very soon in the appearance of low pressure areas in the oil fields; that some of these assumed large proportions (R. 170-171); that other low pressure areas have been formed during the past two or three years as a result of intensive production of gas in concentrated areas for delivery to stripping plants, where the gas was processed for the recovery of a small quantity of natural gasoline, the residue being popped off to the air; that these last mentioned low pressure areas are, for the most part, contiguous to or in close proximity to the low pressure areas resulting from operations in the oil fields, with the result that the entire north side of the field has very low pressure, ranging as low as 50 to 150 lbs., and graduating out across the field

to the southwest to the original reservoir pressure along the southwestern or structurally high portion of the field; that this condition has resulted in the migration of tremendous quantities of natural gas from the southwestern side of the field to the northeastern side of the field (See pressure map above mentioned and also Original Exhibit No. 23); that many of these areas of low pressure are situated in the sour gas producing area, with the result that tremendous quantities of sweet gas have moved out from the sweet gas areas into the sour gas area, where it becomes blended with the sour gas and is produced as sour gas (R. 171); that appellee Texoma originally acquired approximately 261,000 acres of leases in the proven field, of which it still owns about 200,000 acres, known to be capable of producing sweet gas; that these leases represent an investment of approximately $13,000,000.00; that at the time of the trial it and its predecessors had drilled 90 wells on its leases (R. 172-173. The undisputed testimony of Floyd C. Brown, General Manager of Texoma, shows that the drilling of these wells cost Texoma and its assignors $2,225,000.00, R. 209); that appellee Consolidated acquired leases aggregating 10,273.53 acres in the East Panhandle field, on which it and its predecessors drilled twelve wells on leases aggregating 1,473.63 acres (R. 173); that natural gas cannot be stored, as can most other commercial commodities, but can be delivered to the ultimate consumer only by pipe lines connecting the wells at the source of supply with the burner tips of the consumers (R. 174); that appellees and other pipe lines similarly situated own about 80% of all the reserves of sweet gas in the field, and about 62% of all the gas, including both sweet and sour, contained within the reservoir (R. 175); that the leases and reserves owned by appellees and other pipe line companies are located in the sweet gas area on relatively high structural positions, and that most of the other gas wells and

all of the oil wells are located on lands lying between the reserves of the pipe lines and the northeastern or structurally lower edge of the reservoir (R. 176); that appellee Texoma's 90 producing wells are located on developed leases aggregating 81,928.44 acres, an average of 911 acres for each well, and have produced an average of 1,312,000 cubic feet of gas per acre; that the 180 sweet gas wells in the West Panhandle field not connected to pipe lines are located on leases aggregating 30,096 acres, an average of 167 acres per well, and have produced an average of 13,900,000 cubic feet per acre; that the 211 sour gas wells are located on leases aggregating 33,750 acres; an average of 159 acres per well, and have produced an average of 14,700,000 cubic feet per acre (R. 177); that the average rock pressure of appellee Texoma's wells was 336.8 lbs. per square inch, that of the wells belonging to all the pipe lines in the West Panhandle field was 364.5 lbs. per square inch, that of the 180 sweet gas wells in the West Panhandle field not connected to pipe lines was 233 lbs. per square inch, and that of the 211 sour gas wells was 220 lbs. per square inch (R. 177); that the average rock pressure of the 201 sweet gas wells in the East Panhandle field was 315 lbs. per square inch (the undisputed testimony shows that the average rock pressure of appellee Consolidated's 12 wells was 269 lbs. R. 241); that the average for the 121 wells in the East Panhandle field not connected to pipe lines was 222 lbs.; that the 391 wells in the West Panhandle field not connected to pipe lines are practically all located between the wells of the pipe lines and the low pressure areas along the northeastern side of the reservoir, or in those low pressure areas (R. 177), and that in the East Panhandle field the 121 wells not connected to pipe lines practically all lie between the wells of the pipe line companies and the low pressure areas, or in such low pressure areas (R. 177-179); that by reason of these differentials in

pressure between the wells connected to pipe lines and those not connected, the migration or drainage as a whole is from the wells connected to pipe lines, including those connected to appellees' lines, to the wells not connected to pipe lines (R. 177-178); that the twelve wells of appellee Consolidated are situated near the areas of low pressure, and the rock pressures of those wells and of other wells similarly situated tend to show that had said appellee not produced its market requirements from these twelve wells, they would probably have substantially the same rock pressure as now obtaining, due to the heavy migration from the leases on which these wells are located to the low pressure areas immediately to the northeast thereof (R. 178); that very large quantities of gas have migrated from the reserves of the pipe lines, including the reserves of appellees, to the low pressure areas in and around the oil field on the northeastern slope of the reservoir and to the areas in which most of the 391 wells belonging to others than the pipe lines in the West Panhandle field are situated; that without regard to the rate of withdrawal in the existing areas of low pressure, the migration of gas from the reserves of the pipe lines to these areas of low pressure will continue over a long period of time (R. 178); that the leases on which wells connected to pipe lines in the East Panhandle field are located have produced an average of 8,116,000 cubic feet of gas per acre, and those on which the wells connected to stripping plants are located have produced an average of 16,662,000 cubic feet per acre; that the orders attacked restricted the production from gas wells situated in the sweet gas area of the West Panhandle field, embracing 723,000 acres, to 602,000,000 cubic feet per day for the month of January, 1936 (R. 179. The order of December 18, 1935, fixed the allowable for the sour gas area, which embraces 270,000 acres, for the same month at 520,-

496,000 cubic feet daily, R. 498); that the orders require that the total volume of allowable production (in the West Panhandle field) be apportioned among all the wells producing from the sweet gas area, 293 of which belong to the pipe lines (90 to Texoma), and 180 of which belong to other owners (R. 179); that in the orders no provision was made for and no account was taken of leases belonging to the pipe lines or others on which no wells had been drilled, nor is any provision made for or account taken of producing acreage included within large leases in excess of 640 acres in the West Panhandle field and 160 acres in the East Panhandle field (The undisputed evidence shows that under the orders and schedules Texoma was allowed to produce from its wells 136,133,000 cubic feet daily and Consolidated was allowed to produce 7,811,000 cubic feet daily (R. 533). The parties stipulated (R. 296) that the market outlet of Texoma was more than 150,000,000 cubic feet daily, and that of Consolidated was more than 25,000,000 cubic feet daily); that under the orders it was impossible for appellees and several other pipe lines similarly situated to supply their marketing requirements and contracts from their own wells; that the drilling of additional wells would not cure this situation for the reason that so long as there are wells in the same field not connected to pipe lines and the total production is limited to the total market outlets, substantially all of which are the private marketing contracts and commitments of the pipe lines, and this production is distributed among all the wells, appellees and the other pipe lines similarly situated will be unable to supply their marketing contracts from their own wells; that in order to comply with their marketing requirements and commitments, they will be required to purchase gas from the

owners of the wells in the field not connected to pipe lines, notwithstanding they have an abundant supply of their own gas to fulfill all of their marketing contracts and commitments (R. 182).

In its conclusions of law the court held that the necessary operation and effect of the statute, as construed by appellants, and of the orders is to prevent appellees from protecting themselves, to the extent that they are able to market their gas, against the enormous losses by drainage now occurring and which will continue to occur from their leases in areas of high pressure to existing low pressure areas (R. 185); that they operate, therefore, to confiscate and take from appellees their property and the use of their property without due process of law, deny appellees the equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States and of Sections 16, 17 and 19, of Article I, of the Constitution of Texas, and to take, damage and destroy appellees' property for a purported public use, but in fact private use, without compensation and without appellees' consent, in violation of Section 17, Article I, of the Constitution of Texas (R. 185).

Appellants included in their Specifications of Error no attack upon any of the fact findings of the trial court above referred to (appellants' brief p. 11). By Specification of Error No. 3, in terms too general, we think, appellants attempt to raise the point that the trial court erred in holding that the statute and orders operate to confiscate appellees' property in violation of the Fourteenth Amendment to the Constitution. Under Rule 27, Paragraph 2(e), of this court and the authorities cited at page 39 of this brief, we think this specification is entirely insufficient to entitle appellants to take the position they take in their

brief, for the reason that it is in such general terms as that it does not identify the specific holding of the trial court to which it purports to refer.

The evidence conclusively establishes as a matter of law all of the facts above stated. The statements of appellants in their brief to the contrary notwithstanding, the fact is that never at any time in the history of the field has the percentage of the total current production taken by the pipe lines from their wells and leases even approached the percentage of the entire reservoir owned by the pipe lines.

In *Texoma Natural Gas Co.* v. *Terrell, supra,* decided on December 23, 1932, the court, in reviewing the same contention which appellants are making here, said:

> "Though the defendants do recite in the order that the shutting in of the wells in part of the territory and the limitation of those in other parts of it to 4% of their capacity is necessary to prevent the owners of wells having no market outlet from having their gas drained away, this finding is not only without evidence to support it, but it is directly in the face of the undisputed facts that plaintiffs are not even taking the proportion of the gas which on allocation would be their due."

In *Canadian River Gas Co.* v. *Terrell, supra,* decided June 22, 1933, the same court, in reviewing the same contentions, said:

> "Here, as in the 'Shutdown Case,' the undisputed evidence indicates that plaintiffs are not and have not been taking the proportion of the gas which, under allocation, would be their due."

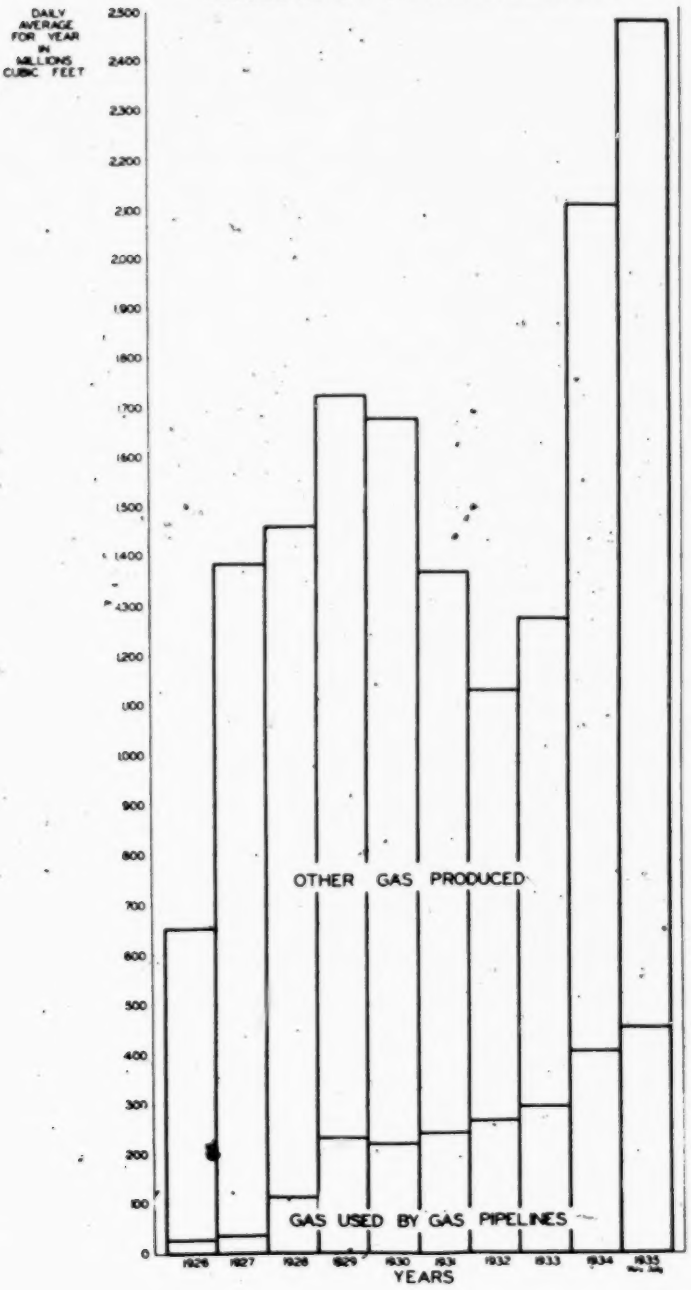
Original Exhibit No. 6 filed with the record here conclusively shows that in the year 1932 the low pressure areas along the northeastern flank of the reservoir were already

formed, and that at that time the pressures in the areas in which appellees' properties were situated had already been greatly reduced as a result of drainage to the then existing low pressure areas. That pressure map shows that the situation in 1932 differed from the situation in 1935, reflected by Original Exhibit No. 5, only in degree—that the havoc wrought by the oil producers and strippers upon the gas reserves of appellees and other pipe lines had greatly increased during the interval between 1932 and 1935, but that the same general condition obtained at the time the first map was prepared.

Original Exhibit No. 13 graphically shows the situation we are trying to describe. For the convenience of the Court, we have caused a cut of this graph to be inserted in this brief on the opposite page. The facts reflected by this graph are without dispute. The successive columns represent the comparative production of gas as between the pipe lines and other producers for successive years beginning with 1926 and ending July 31, 1935. The section at the bottom of each column represents the total volume of gas taken by all the pipe lines during the year shown at the bottom of the column. The remainder of the column shows the total volume of gas produced during the same year by other producers of gas. It will be remembered, of course, that the pipe lines own about 62% of all the gas in the reservoir. It thus appears from this graph, which accurately illustrates the full testimony on this point, that during no year did the production by all the pipe lines combined even approach 62% of the total production, to which 62% of the total production they were entitled on a basis

ESTIMATES OF TOTAL GAS PRODUCED FROM TEXAS PANHANDLE OIL AND GAS FIELD SHOWN BY DAILY AVERAGES

GAS TO AIR FROM GASOLINE PLANTS DURING 7 MONTHS 1935
AVERAGE PER DAY 1,044,936,000 CUBIC FEET



of their ownership. It will be seen that in 1926 very little gas was produced by pipe lines, which were just in their beginning. The takings of the pipe lines, however, increased year by year, until in 1935 they had reached approximately 450,000,000 cubic feet daily. During that year, however, other owners produced 2,025,000,000 cubic feet daily. As already pointed out, appellants in their brief state that prior to 1933 the pipe lines were taking all the sweet gas being produced in the field. We have already shown the utter lack of any basis for that statement; but we call the Court's attention again to this reckless statement of appellants in connection with its consideration of this graph. During the years 1926 to 1932 inclusive, all the pipe lines produced successively about 20,000,000, 25,000,000, 115,000,000, 225,000,000, 220,000,000, 230,000,000, and 275,000,000 cubic feet daily. During the same years others produced 630,000,000, 1,360,000,000, 1,345,000,000 1,495,000,000, 1,460,000,000, 1,150,000,000, and 850,000,000 cubic feet daily. As already stated in this brief, this graph portrays the takings of both sweet and sour gas; but by reason of the interconnection between the formations producing sweet and sour gas, the results in drainage from the reserves of the pipe lines are exactly the same as if the total production had been sweet gas.

Original Exhibit 4 shows that Texoma's properties in the West Panhandle field are scattered along almost its entire length, and that numerous tracts, aggregating many thousands of acres, are located in close proximity to the areas of low pressure reflected by Original Exhibit No. 5.

Original Exhibit No. 14, also filed with the record in this

cause, graphically presents the comparative withdrawals of gas by Texoma and other producers in the West Panhandle field for the months of January to July, inclusive, of 1935. A cut of this graph is shown on the opposite page of this brief, from which it appears that, with an ownership of 20% of the total reserves, Texoma produced only about 2% of the total daily withdrawals; and the other pipe lines in the West Panhandle field, with an ownership of 36%, produced only about 5% of the total daily withdrawals. Thus it appears that all the pipe lines, with an ownership of 56% of the total reserves in the West Panhandle field, produced only about 7% of the total daily withdrawals, while the others, with an ownership of only 44%, produced about 93% of the total daily withdrawals. The trial court found that, with an ownership of approximately 20%, appellee Texoma had produced only 2.25% of the total withdrawals of gas from the West Panhandle field.

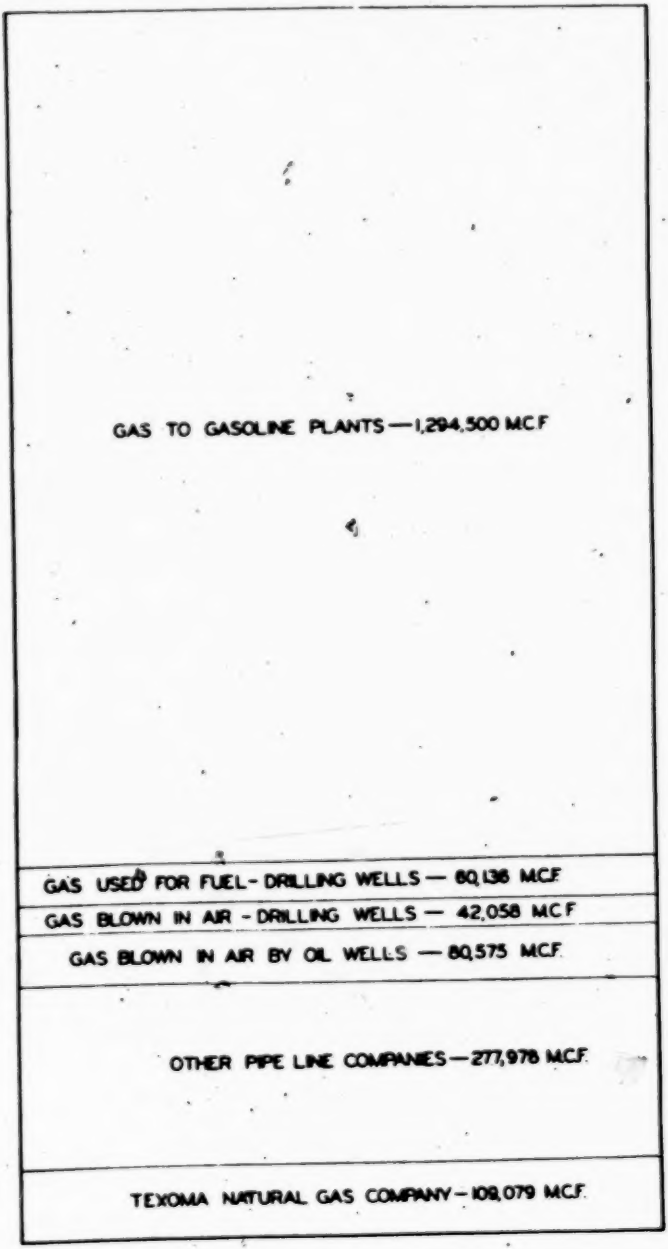
In the face of these findings by the court, these graphs, and the undisputed testimony above pointed out, appellants repeatedly state in their brief that the statute and orders are justified because the pipe lines have been taking and are taking an undue proportion of the gas from the Panhandle field.

Applying their theory specifically to the properties of appellee Texoma, appellants in their brief, at pages 96 to 107, undertake to demonstrate that Texoma has drained more than 6,000,000,000 cubic feet of gas from others by the operation of 33 wells. In the light of the figures and graphs to which we have already referred, that is the most preposterous of the many preposterous statements made in appellants' brief. Let us see what is wrong with this "demonstration" of appellants. In the first place, appellants assume (p. 97) that the pressure declines in these

WEST PANHANDLE FIELD
AVERAGE DAILY WITHDRAWALS OF GAS
JANUARY TO JULY, 1935, INCLUSIVE

TOTAL WITHDRAWALS PER DAY — 1,884,326,000 CUBIC FEET

GAS TO AIR FROM GASOLINE PLANTS - 750,085,000 CUBIC FEET



33 wells as of the date they were purchased by Texoma indicate that they were being produced prior to their acquisition by Texoma. On the preceding page they state that, naturally, the production from the sweet gas wells was during the period beginning with the sour gas law (1933), since they for the most part could not produce at all prior to that time. We have already shown that many sweet gas wells were produced and that tremendous volumes of gas had been produced from oil wells in the sweet gas area. Texoma bought its properties in August, 1931. Then, under appellants' own statement, the declines in pressure from Texoma's 33 wells referred to in these calculations must have been accounted for by drainage to the low pressure areas in the vicinity of these wells, occasioned by the profligate production of gas in the oil fields aggregating, according to the figures of the Railroad Commission heretofore referred to, about 2,000,000,000,000 cubic feet. There is absolutely no basis in the record for appellants' assumption that any of these 33 wells had produced sweet gas in any substantial quantity prior to August, 1931, when Texoma acquired them.

The pertinent question here is, what has happened and what will happen to the properties now belonging to Texoma? We have already pointed out that the trial court found on undisputed testimony that, by reason of the now existing physical conditions, the drainage from the leases of Texoma and the other pipe lines to the low pressure areas resulting from the past profligate and wanton waste of gas in the oil fields and in the concentrated areas connected to stripping plants will continue over a long period of time, regardless of whether there be any further production of gas in those low pressure areas. We have already pointed out that these low pressure areas will be aggravated by the continued profligate production of gas in the oil fields under the farcical pretense of regulating the

gas-oil ratio already discussed, and also by reason of the taking of gas from the sour gas area at approximately four times the rate at which the pipe lines are producing their gas. Whether or not the necessary operation and effect of these orders will hereafter be to deprive Texoma of great quantities of natural gas now underlying its leases is the important question. The court has so found, and the appellants point out no fact to the contrary. They repeatedly make the statement that appellees and other pipe lines will eventually produce all the sweet gas in the field; but they do not back up these statements with any facts.

It is absurd to pick out 33 wells of Texoma's 90 wells and undertake to arrive at the whole drainage picture affecting Texoma from such 33 wells. This appears at once from the admissions on cross examination of appellants' witness Massa, who put the figures used by appellants into the record. In his estimates on the properties of appellee Consolidated (R. 328), this witness used as a basis of calculation an original reserve of 30,000,000 cubic feet per acre. In his estimates on these 33 wells of Texoma, he used as a basis of calculation an estimate of 16,000,000 cubic feet per acre. A comparison of the location of Texoma's properties (Original Exhibit No. 4) with the location of the properties of Consolidated (Original Exhibit No. 23) will show that the leases on which these 33 wells were situated were, on the whole, as favorably located on the structure as were the Consolidated wells. Why then cut the estimate of the original content of Texoma's leases to just half of that of the estimate for the Consolidated's leases? This witness admitted that the properties which he had listed (those on which the 33 wells were located) were for the most part in the heavy area (R. 329). He then admitted that Original Exhibit No. 37 on file in this court, prepared by the witness Gill and introduced in evidence, portrays the situation that actually exists in the field and that

Texoma's properties are for the most part located in the areas where the producing formations are thickest (R. 329). He admitted also that it is 350 to 400 miles around the field, and that the producing horizon thins out until it eventually plays out altogether at the edge, and around this immense area there is a thinly saturated area which was figured into Peterson's average (R. 329). Peterson had testified that the original gas reserves under the lands owned by Texoma in the West Panhandle field was around fourteen or fifteen million cubic feet per acre (R. 224). Notwithstanding these admissions and the fact that it was perfectly clear from Massa's testimony that the average of Texoma's reserves could not be used as a basis for estimating the reserves under the particular 33 wells under consideration by Massa, appellants in their tabulations shown on pages 102-103 of their brief, and in fact throughout their discussion of this subject, assumed that the original content of the leases on which these 33 wells were situated was only fifteen million cubic feet per acre.

These facts are entirely sufficient to discredit the whole calculation of appellants; but let us see what the record shows concerning the facts as applied to all the properties of Texoma. As above stated, the witness Peterson estimated the original total reserves of Texoma at fourteen to fifteen million cubic feet per acre (R. 224). The record shows that Texoma owned 198,200 acres (R. 221). His estimates of the total reserves, therefore, aggregate approximately 3,000,000,000,000 cubic feet. Peterson testified that he estimated the total reserves of sweet gas in the West Panhandle field at 11,309,000,000,000 cubic feet (R. 220). Hughes testified that Texoma now owns 20.45% of the original sweet gas reserves in the West Panhandle field (R. 226). 20.45% of 11,309,000,000,000 is 2,312,690,000,000 cubic feet. It thus appears that of the original 3,000,000,000,000 cubic feet of gas, Texoma's properties had lost by

production and drainage a total of 687,309,500,000 cubic feet as of the date of the trial. The record also shows without dispute that Texoma had produced from its wells less than 99,000,000,000 cubic feet (R. 445). The facts are then, as reflected by this undisputed testimony, that the properties of Texoma have lost through drainage a total of 687,309,500,000 cubic feet of gas, or *almost one-fourth of its original reserves.* Yet appellants would force us to buy gas from those who have no pipe line connections, most of whom have been parties to this unconscionable raid on the reserves of Texoma, and they would justify their efforts on the theory that they fear Texoma may take by drainage some of the gas of these other owners!

We take from the record one of the numerous illustrations of how these orders will affect some of the owners of wells who would participate in the markets and pipe line facilities of appellees if the statute and orders were valid. The record shows, as already stated, that 29 wells on leases aggregating about 4000 acres, connected to a stripping plant referred to in the record as Cargray, had produced an average of 28,000,000 cubic feet of gas per acre at the time of the trial and that they were still producing at that time. It also shows that the wells of Texoma had produced less than 3,000,000 cubic feet per acre from its 29 wells nearest this stripping plant, located on more than 15,000 acres. The witness Hughes took these figures and showed at the trial that, at the rate Texoma has been producing its 29 wells in that vicinity during the past six years, it would take fifty years for Texoma to catch up with the production already taken from the neighboring wells connected to the Cargray plant. Will this Court assume that these owners whose wells are connected to the Cargray plant will stand by for another fifty years without developing markets and providing pipe line facilities for transporting their gas to market? If they do, they will not be hurt, for they have

already taken their gas; but it can be safely assumed that when they finally learn that they cannot force appellees and others similarly situated to provide them with markets and pipe line facilities, they will be about the business of developing markets and pipe line facilities.

A great many owners who would benefit from an enforcement of the statute and orders under attack have produced gas out of all proportion to their ownership. Exhibit 16 (R. 459-475) reveals the following instances:

Owner	Well	Production per Acre
Champlin	Bryan 1	169,500,000 cubic feet
"	" 2	228,600,000 " "
"	" 4	99,600,000 " "
Continental	Burnett 5	145,100,000 " "
"	" F-1	67,800,000 " "
"	" L-1	69,000,000 " "
"	" 3-C	65,300,000 " "
Hagy	Magnolia 1	73,400,000 " "
"	Barnard 1	51,500,000 " "
"	Bednorz 1	54,400,000 " "
"	Kalka 1	126,900,000 " "
"	McConnell 2	143,500,000 " "
"	" 3	74,300,000 " "
"	" 4	51,700,000 " "
Skelly	McKay 1	194,100,000 " "
Alamosa	Sanford 3	191,500,000 " "
Danube	Reid 1	83,600,000 " "
"	John Wheatley 1	94,200,000 " "
Deahl	Deahl 2	127,100,000 " "
Henderson	Sanford 1	56,200,000 " "
"	Cont. Whitt.	58,400,000 " "
Phillips	McMan 1	57,400,000 " "
Polo	Sanford 1	1,388,700,000 " "
Reliance	"	424,700,000 " "
Rubin	Rubin 2	283,100,000 " "
"	" 3	419,800,000 " "
"	" 4	279,700,000 " "
Texorado	Sanford 1	386,500,000 " "
Underwood	Johnson 1	63,000,000 " "
American	Burnett 7	88,800,000 " "
Continental	" 2	102,000,000 " "
Gulf	Noel 1	89,000,000 " "

Shell	Bryan 2	225,400,000	"	"
Stanolind	Noel 2	170,400,000	"	"
Alamosa	Sanford 1	197,500,000	"	"
"	" 2	263,900,000	"	"
Antelope	" 2	50,200,000	"	"
Amarillo Bank	Smith 3	117,400,000	"	"
Continental	Sanford 1	71,100,000	"	"
Phillips	Gowland 1	242,300,000	"	"
"	Land 1	139,400,000	"	"
"	" 2	673,100,000	"	"
"	Operators 1	109,800,000	"	"
"	" 2	51,700,000	"	"
"	Otis 1	88,100,000	"	"
"	Pool 2	154,100,000	"	"
"	Rudy 1	353,100,000	"	"
Shell	Smith 3A	82,200,000	"	"
Skelly	Johnson 6	69,100,000	"	"
"	Sanford 1	105,300,000	"	"
S & W	Cockrell 2	87,300,000	"	"
Williams	Sanford 1	130,600,000	"	"
Barnsdall	Jones 1	98,600,000	"	"
Shamrock	" 1	170,900,000	"	"
Sunray	" A-1	467,200,000	"	"

It will be noted that we have listed no well which has produced less than 50,000,000 cubic feet per acre. Assuming that all these wells are located in highly productive areas with an original content of 25,000,000 cubic feet per acre, these owners have produced from *two to fifty-five* times as much gas as that originally owned in place. Yet appellants in effect contend that the Legislature intended by this statute to authorize the Commission to coerce the pipe lines, which have suffered such terrible drainage, to divide their markets and facilities with these owners—that the latter may produce gas which formerly belonged to the pipe lines and sell it back to them!

The average production per acre by the wells connected to pipe lines in the West Panhandle field is 1,157,000 cubic feet. The average for all wells not connected to pipe lines in that field is 14,300,000 cubic feet per acre. The average for the unconnected wells which have actually produced is

19,500,000 cubic feet per acre. In the East Panhandle field the average production per acre from wells connected to pipe lines is approximately 8,010,000 cubic feet; and the average production from wells not connected to pipe lines is 16,602,000 cubic feet (R. 241). It thus appears that the wells not connected to pipe lines, and which would benefit by the enforcement of the statute and orders, have produced an average of twelve times as much gas in the West Panhandle field and twice as much gas in the East Panhandle field, as have the wells connected to pipe lines. It is true that there are included among the wells not connected to pipe lines about fifty wells in the West Panhandle field and about seven wells in the East Panhandle field which have never produced. All of these wells have suffered substantial pressure declines, not as a result of production by the pipe lines, but as a result of the profligate wastage of gas by the owners of oil wells and of wells connected to stripping plants. In the light of the record (See specially Original Exhibit No. 14 and cut thereof opposite page 152 of this brief), *we earnestly insist that the pipe lines have not taken by drainage a single foot of gas belonging to other owners.* On the other hand, they have been the chief victims of drainage. Not until they have taken from the common reservoir their rightful proportion of the current production can it justly be said that the pipe lines have been guilty of drainage.

Exhibits Nos. 3 (R. 439-458) and 24 (R. 500-532) disclose that some of the wells belonging to pipe lines, including the twelve wells of Consolidated, have produced substantially more than the average production per acre of appellee Texoma or of all the pipe lines. It will be remembered, however, that all of these pipe lines own extensive undeveloped reserves of gas. On pages 92 to 96 of their brief, appellants would take appellee Consolidated to task because it has produced an average of 30,620,000 cubic

feet per acre from the 1473.63 acres on which its twelve producing wells are situated. They have stated only a part of the picture, however, and, as we have pointed out in the case of their discussion of Texoma's production from 33 of the latter's wells, they have fallen into serious error so far as the ultimate results are concerned. Consolidated owns a total of 10,273.53 acres. It has drilled its wells on leases aggregating only 1473.63 acres. Original Exhibit No. 23 shows in cross-hatched tracts the leases belonging to appellee Consolidated. The leases showing wells are all located in very close proximity to the very low pressure area to the north occasioned by heavy production in the oil fields. Some of these pressures run as low as 60 lbs. per square inch. The pressure band in which these wells are situated extends on to the westward, where there is no production from the area represented by the same pressure band. As already pointed out, this indicates conclusively that the pressures of the leases on which its wells are located would have been at substantially the same level today if these wells had never been produced, on account of the drainage to the oil fields. It will be noted that this company owns other leases in the area shown to be within the same pressure level, on which no wells have been drilled. What point would there have been in Consolidated's making the additional investments necessary to drill wells on its other tracts in the same area? It would have been poor business to do so, and it would have accomplished nothing for itself or for the owners of other gas reserves. The trial court found without contradiction that the average rate of production from Consolidated's wells has been 4.89% of the potential open flow. The strippers were permitted to produce 25% of their open flow (R. 535), and it can be safely assumed that they produced at least that much.

Now let us examine the figures concerning Consolidated's

production and its reserves as a whole. On a basis of Peterson's estimated average content of 15,000,000 cubic feet per acre (Camp's estimate was 16,000,000 to 17,000,000 cubic feet per acre), the 10,273.53 acres of Consolidated originally contained a total of 154,102,950,000 cubic feet. The undisputed evidence shows that Consolidated and its predecessors have produced a total of 45,214,776,000 cubic feet of gas from its twelve wells. Deducting this production from the original reserves, it appears that, based on its withdrawals, Consolidated should now have 108,888,174,000 cubic feet within its reserves. The undisputed estimate of the present content of these leases, however, is 101,900,000,000 cubic feet. It thus appears that Consolidated's leases as a whole have been drained of 6,988,174,000 cubic feet of gas.

Appellants excluded from the reserves of Consolidated 1500 acres which lie in Collingsworth County, on the ground that it is not within the proven gas area. The witness Camp testified that such lands were within the proven area (R. 245). Of course, the intensive development has not extended into Collingsworth County; but Original Exhibit No. 23 shows the field as extending on beyond the location of these Collingsworth County leases. Peterson, who is an employee of Texoma, the reserves of which are in the West Panhandle field, prepared Original Exhibit No. 5, which is a pressure map showing the entire field. An examination of this map will show that the heavy lines marking the outside boundaries of the proven area begin at the points where these lines intersect the north line of Collingsworth County, showing clearly that this geologist believed that the proven gas field extends on into Collingsworth County. Peterson's estimate of 15,000,000 cubic feet of gas per acre embraces the areas along the outside edge of the entire field. If the 1500 acres in Collingsworth County be excluded from Consolidated's reserves, then a higher acreage

content would have to be used. In the above calculations, therefore, we have used all the acreage and the average which embraces all the acreage in estimating the original reserves of Consolidated. Since its original reserves, as above pointed out, exceeded its production by the quantity of 108,888,174,000 cubic feet, it cannot justly be said that Consolidated has taken the gas of any other owner by drainage until it shall have produced from its reserves such 108,888,174,000 cubic feet of gas.

In their brief (pages 107-113) appellants anticipate the circumstance that it might occur to anyone reflecting on the conditions prevailing in the Texas Panhandle that these unhappy conditions resulted from the adoption of an improvident public policy on the part of the Legislature (they might have added the improvident policy of the Commission in permitting the unconscionable wastage to the air of 2,000,000,000,000 cubic feet of gas from oil wells and in licensing stripping plants even before the enactment of the stripping law). They insist, in substance, that the Legislature had a serious problem before it and had the authority to forget the past and start all over again in the regulation of this field. It is true that nothing can be done now that will recover for its owners and for the use of the general public the trillions of cubic feet of gas that have been wasted to the air; but we insist that the Legislature cannot ignore the fact that tremendous inroads have been made upon the private gas reserves of appellees and the other pipe lines through the conduct of other owners and, as compensation to these other owners for requiring them to cease their wasteful practices, punish and penalize the pipe lines, which have been guilty of no waste, by requiring the latter to purchase gas from other owners, including those guilty of such wasteful practices.

Appellants say that "the Legislature is the exclusive judge of the remedies which may be applied and the limits

of action, so *long as constitutional rights are not transgressed.*" (Italics ours.) Let that be conceded; but the point we make here is that in the proposed solution the constitutional rights of appellees and others similarly situated are emphatically transgressed, because the statute and orders necessarily operate to deprive appellees and others similarly situated, through drainage to other wells, of enormous quantities of gas, which otherwise appellees could produce and sell in pursuance of their private marketing contracts. In discussing this point, and in fact throughout their brief, appellants make the statement that appellees own and control the only outlet available for light and fuel purposes. We have already pointed out that such is not the case. There are other markets potentially as promising as any that appellees and the other pipe lines have developed. There is plenty of room on the plains between this gas field and the midwestern centers of population for the building of additional pipe lines. Appellees control no pipe line facilities except those which they have constructed at their own cost. They control no markets except those evidenced by their private contracts, procured after long and expensive negotiations. The control they exercise toward the present pipe line facilities and the present market outlets is the same character of control that every property owner in America exercises over his own private property. Exhibits Nos. 16 and 22 disclose that many of the wells not now connected to pipe lines are owned by large oil companies, which, it can be safely assumed, are as able to negotiate marketing contracts and to build pipe lines as were appellees or any other pipe line company operating out of the Panhandle field. If there be others who are not in such position, that circumstance is not chargeable to appellees, and they cannot be put in position to exercise their legal rights at the expense of appellees without the taking of private property of appellees.

We realize that we are passing through an era characterized by a disposition on the part of many people to look to the government for the solution of every social and every business problem; but there are constitutional limits beyond which the government cannot go in listening to the clamor of those who prefer to petition the government rather than to exercise their own private initiative and invest their own money. We can conceive of no more flagrant example of an effort to go beyond these limits than that presented by the facts of this case. If, as appellants insist throughout their brief, the Legislature had the right to prescribe a remedy for a situation in the Texas Panhandle, for which appellees are in no sense responsible, and if appellees, as appellants, in substance, say, cannot be heard to question the remedy which the Legislature and its agent, the Commission, see fit to prescribe, then what has become of the work of Washington, Madison, Hamilton, Franklin, and those who wrought with them at Philadelphia? Why have a constitution in this country?

6. THE NECESSARY OPERATION AND EFFECT OF THE STATUTE AND ORDERS IS TO CONFISCATE THE USE OF APPELLEES' PIPE LINES AND OTHER TRANSPORTATION FACILITIES, WHICH APPELLEES HAVE CONSTRUCTED AS A MEANS OF TRANSPORTING THEIR OWN GAS TO MARKET, WITHOUT DUE PROCESS AND WITHOUT COMPENSATION, FOR THE USE AND BENEFIT OF OTHERS WHO HAVE CONTRIBUTED NOTHING TO THE CONSTRUCTION OR COST OF SUCH FACILITIES.

7. THE NECESSARY OPERATION AND EFFECT OF THE STATUTE AND ORDERS IS TO CONFISCATE, WITHOUT DUE PROCESS AND WITHOUT COMPENSATION, APPELLEES' PRIVATE MARKETING CONTRACTS, NEGOTIATED BY THEM WITH A VIEW OF DISPOSING OF THEIR OWN GAS, FOR THE USE AND BENEFIT OF OTHERS WHO HAVE CONTRIBUTED NOTHING TO THEIR NEGOTIATION.

As we have already pointed out, in *Texoma Natural Gas Co.* v. *Railroad Commission, Texoma Natural Gas Co.* v.

Terrell, and *Canadian River Gas Co.* v. *Terrell, supra,* involving orders similar to those under consideration here, the court held that the necessary operation and effect of the orders was to require the pipe lines to divide their markets and transportation facilities with the owners of other wells. In the first case the statute and orders expressly so provided. In the second case the court held that the orders necessarily had that effect; and in the third case the Commission and the Attorney General made exactly the same contentions they are making here, and again the court held that the purpose of the orders, as disclosed by their necessary operation and effect, was to appropriate for the benefit of owners of other wells substantial interests in the markets and transportation facilities of the pipe lines. In the present case the court again found that the necessary operation and effect of the orders is to coerce appellees and others similarly situated to buy gas from, and thus to share their private marketing contracts and commitments and the use of their pipe lines and other facilities with, the owners of wells not now connected to pipe lines, who have not contributed in money, services, negotiations, skill, forethought or otherwise to the development of such markets and contracts of such pipe lines and their other facilities—in short, to compel appellees to afford markets to those having none (R. 183). In this connection the court held in its conclusions of law that if the Legislature intended to empower the Commission to issue and enforce orders limiting and prorating the production of gas except for the purpose of preventing waste, the act and orders are invalid and unenforcible because their necessary operation and effect is to confiscate, without compensation, appellees' private markets and their pipe lines and other facilities for transmitting gas to market, and thus operate to confiscate and take from appellees property and the use of their property without due process of law, in violation

of the Fourteenth Amendment to the Federal Constitution and of provisions of the Texas Constitution.

The trial court further found that the gas field is situated in a thinly populated section of the country; that there is no market outlet for gas within the field itself except for fuel in the drilling of wells and in the operation of industries incident to the oil and gas business (R. 172); that about the year 1928 several groups of individuals and corporations, some of whom already owned extensive reserves of gas in the field, commenced the development of pipe line projects looking to the production of natural gas from this field and to transmitting it to distant markets, most of which were located in the so-called Middle West, outside the State of Texas; that among these groups were the founders of appellees (R. 172); that after acquiring its leases appellee Texoma expended several million dollars in constructing a main pipe line from the town of Fritch, in Hutchinson County, Texas, to a point near the town of Gray, Oklahoma, a compressor station at the town of Fritch, and gathering lines connecting its main line with its wells (the uncontradicted testimony shows that these facilities represented an investment by Texoma greatly in excess of the sum of $8,500,000.00 R. 208); that an affiliated company constructed a large trunk pipe line from the town of Gray, Oklahoma, to Joliet, Illinois, near the city of Chicago, at a cost of more than $35,000,000.00 (R. 173); that the affiliated company and Texoma together have expended more than $500,000.00 in efforts to secure markets and marketing contracts for natural gas (R. 173); that the total investment of said appellee and its affiliated company, whose interests constitute one general project, is more than $72,000,000.00 (R. 173).

The trial court also found that in addition to acquiring its leases and drilling twelve wells, appellee Consolidated has constructed a main pipe line leading from a point near

its producing leases in Wheeler County, Texas, to the cities of Enid, Oklahoma, Hutchinson, Kansas, and Wichita, Kansas, and has constructed gathering lines connecting its wells with this main pipe line; that its total investments aggregate more than $10,000,000.00, in addition to which it has expended substantial amounts in conducting negotiations for the marketing of its gas at points outside the State of Texas (R. 174); that natural gas cannot be stored, as can most other commodities, but must be delivered to the ultimate consumer only by way of pipe lines connecting the wells with the burner tips of the consumers (R. 174); that the circumstance that gas cannot be stored or transmitted to market except by pipe lines and the economic cost of pipe lines over the distances between the Panhandle gas field and centers of population combine to bring about a situation where there is no field market for any substantial quantity of sweet gas; that natural gas is in competition with other fuels, such as coal, fuel oil and coke oven gas, and the development of markets is attended with protracted negotiations involving heavy cost; that these negotiations culminate in private contracts for the sale and purchase of natural gas—in the case of appellees, at points distance from the Panhandle (R. 174); that these marketing contracts constitute very valuable property to appellees (R. 175); that under the orders attacked it is impossible for appellees and several other pipe lines owning wells and leases in the Panhandle to supply their marketing requirements and contracts from their own wells; that the drilling of additional wells will not cure this situation for the reason that so long as there are wells in the same field not connected to pipe lines and the total production is limited to the total market outlets, substantially all of which are the private marketing contracts and commitments of the pipe lines, and this production is distributed among all the wells, including those not connected

to pipe lines, appellees and other pipe lines similarly situated will be unable to supply their marketing contracts from their own wells; that in order to comply with their marketing contracts and commitments appellees and others similarly situated will be required to purchase gas from the owners of wells in the field not connected to pipe lines, notwithstanding the pipe lines have an abundant supply of their own gas to fulfill all their marketing contracts and commitments (R. 182).

Appellants expressly plead that a part of the legislative scheme was to supply a market for light and fuel to the owners of wells whose use of their gas for stripping and other wasteful processes the amended law had prohibited (R. 133). In their answer they expressly admitted that it was the purpose and intent of H. B. 266 to prevent appellees and those similarly situated from supplying their entire market requirements from their own wells (R. 50). In the face of this history, of the evidence in this case, of the findings of the court, and of their own pleadings, we find appellants, in their brief, asserting that the operation of these orders does not give to any other producer in the Panhandle gas field the right to transport his gas through appellee's pipe lines, and that it does not force appellees to buy a single cubic foot of gas from any other producer (appellants' brief, p. 127). They also say (p. 130) that so far as the record is concerned, it is not shown definitely, much less conclusively, that appellees will not be able to comply with their contracts with the pipe line companies to which they are delivering gas, but that the most that can be made from the record is that in order to carry out and comply with their contracts it may be that appellees will *choose* to purchase some gas. It may mean nothing to appellants, but it means a great deal to appellees, that they have their commitments out for the delivery of natural gas in fulfillment of their marketing contracts.

In the very nature of things, they will lose these contracts unless they perform them, and not only will they lose them, but they will be subjected to damages for their breach unless they deliver the gas they have contracted to deliver. If they cannot produce it from their own wells, how then can they perform their contracts? There is but one way to perform them, and that is to "choose" the course of taking gas from other wells. Even if it were practicable, in the light of their existing obligations, to cut down their deliveries during a given month by the quantity necessary to conform their total sales to the quantity they can produce from their own wells, the total market outlet would be automatically reduced the following month to the quantity they had actually delivered, with a proportional reduction in the allowables from appellees' wells. Then the new allowables would again be cut the following month, with a further reduction in allowables, until eventually appellees would be producing an infinitesimal quantity of gas. *Just so long as there are wells in the Panhandle belonging to others than the pipe lines,* any order requiring that the total private market requirements of the pipe lines to fulfill these marketing contracts be taken from all the wells in the field, the pipe lines will be confronted with the option to breach their outstanding obligations to consumers or divide the benefits of these obligations as well as the benefits of their pipe lines with the owners of these other wells by purchasing gas from the latter. In order to do this even then, appellees can perform their obligations to their purchasers only after coming to terms on prices, conditions of delivery, and numerous other points of negotiation with the owners of these other wells. This would place appellees at such disadvantage as that these other owners could make unreasonable demands upon appellees and they would be helpless to protect themselves except at the expense of breaching

their contracts with their own customers. This is illustrated by the testimony of F. L. Chase (R. 437-438), in which the witness, for his company, magnanimously offered to *negotiate* with Texas Panhandle Gas Company (predecessor of appellee Consolidated) for the additional gas needed to meet its market requirements, "*at a price and upon terms and conditions to be mutually agreed upon.*" Without any argument the Court will at once realize the disadvantage at which appellees would be placed under such circumstances. What would be accomplished under the theory of appellants themselves, unless the pipe line should purchase gas from the owners of other wells? Time after time in appellants' brief they assert that there are no markets except those owned by the pipe lines. How are they going to have production from all the wells, then, unless the pipe lines divide those markets with the owners of other wells?

The real contention of appellants is that while appellees and other pipe lines will be forced to purchase gas and thus to divide their markets and pipe line facilities, this circumstance is immaterial. They cite *Champlin Ref. Co.* v. *Corporation Commission,* 286 U. S. 210; 76 L. E. 1062, and *Danciger Oil & Ref. Co.* v. *Railroad Commission,* 49 S. W. (2) 837. These cases do not sustain their contention. In both of these cases the regulations attacked were waste regulations and the fact of waste was established to the satisfaction of the court. In the former case this court referred to the loss because of earthen storage, resulting in large surface losses due to seppage, rain, fire and evaporation, all due to the production of oil in excess of market demand, and also to the waste caused by the excessive and wasteful use of gas pressure in producing oil without limitation. In the *Danciger* case the trial court found that the orders would prevent waste in the production of oil. The Court of Civil Appeals, whose opinion is

cited, was bound by these findings of fact. Some of the holdings in that case are subject to serious question. A writ of error was granted by the Supreme Court, but before the latter court reached the case it became moot and was dismissed on that ground; so the *Danciger* case cannot be said to be a final judgment by a court of last resort. In any event, it, too, was a waste case.

Appellants assert that it is wholly immaterial that the regulations involved in those two cases related to waste; that the restriction was by virtue of the exercise of the police power of the State. It may be granted that the restriction was upheld by virtue of its being in the exercise of police power; but it was a valid exercise of police power in the prevention of waste of a natural resource. The question here is whether or not the Legislature, *under the guise* of police regulation, can take from one owner private property and the use of private property and confer it on another, without due process and without compensation. In other words, the question here goes to the very issue of whether or not the regulation is valid as a proper exercise of the police power.

It is well settled that the police power may not be used by a branch of the State government or by representatives of the State as a cloak for the invasion of personal rights or private property, and that it cannot be exercised under any circumstances for private purposes or for the exclusive benefit of particular individuals or classes. 12 C. J. 930, and cases there cited. If exercise for public purposes, it must be conditioned upon the paying of adequate compensation, unless the use of the property which is prohibited be in some manner a noxious use.

Thus, in 1 Dillon on Municipal Corporations, 4th Ed., page 141, it is said:

> "These regulations (referring to police regulations) rest upon the maxim, '*Salus populi suprema est lex.*'

> This power to restrain the private injurious use of property is essentially different from the right of eminent domain. It is not a taking of private property for public use, but a salutary restraint on a noxious use by the owner, contrary to the maxim, '*Sic utere tuo ut alienum non laedas.*'"

Laws enacted in the exercise of police power, whether by municipal corporations acting in pursuance of laws of a State or by the State itself, must be reasonable, are always subject to the provisions of both the Federal and State constitutions, and are always subject to judicial scrutiny. *In re Wilshire*, 103 Fed. 620, 622.

This Court, in *Mugler* v. *Kansas*, 123 U. S. 661, 31 L. E. 210, said:

> "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, the statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution."

In *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373; 30 L. E. 220, 227, the court used this language:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

Again, in *Lockner* v. *New York*, 198 U. S. 45, 57; 49 L. E. 937, 942, it was said:

> "The mere assertion that the subject relates, though

but in a remote degree, to the public health, does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, *and the end itself must be appropriate and legitimate,* before an act can be held to be valid, which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor."

Forster v. *Scott,* 18 L. R. A. 543, 546 (N. Y. Court of App.) is another well considered case holding to the same effect. We quote from the opinion:

"The validity of a law is to be determined by its purpose and its reasonable and practical effect and operation, though enacted under the guise of some general power, which the legislature may lawfully exercise, but which may be and frequently is used in such a manner as to encroach, by design or otherwise, upon the positive restraints of the Constitution. What the legislature cannot do directly, it cannot do indirectly, as the Constitution guards as effectually against insidious approaches as an open and direct attack. Whenever a law deprives the owner of the beneficial use and free enjoyment of his property, or imposes restraints upon such use and enjoyment that materially affect its value, without legal process or compensation, it deprives him of his property within the meaning of the Constitution. All that is beneficial in property arises from its use and the fruits of that use, and whatever deprives a person of them deprives him of all that is desirable or valuable in the title and possession. It is not necessary, in order to render a statute obnoxious to the restraints of the Constitution, that it must in terms or in effect authorize an actual physical taking of the property or the thing itself, so long as it affects its free use and enjoyment, or the power of disposition at the will of the owner. Though the police and other powers of government may sometimes incidentally affect property rights, according to established usages and recognized principles familiar to courts, yet even these powers are not without limitations, as they can be exercised only to promote the public good, and are always subject to judicial scrutiny."

Under these authorities, the Court will concern itself with the language of the statute only to the extent that it is necessary to arrive at its meaning in connection with its necessary operation and effect. There can be no question of the necessary operation and effect of the orders. They are to take appellees' gas, their markets and their pipe line facilities for the benefit of private owners of other wells, without due process and without compensation.

If in fact there would be an improvement in conditions from the standpoint of the public by the operation of the statute and orders, is it just or equitable—is it reasonable—to require that appellees bear the entire burden of the cost and expense involved in such an improvement? We assert that there is no public interest here involved. The public's interest is satisfied when the waste is stopped. From the public's standpoint, it is wholly immaterial whether the gas from this field be transported and marketed for lawful and useful purposes by appellees and the other pipe lines or by other private owners. Of course the State is interested in preserving the rights of each private owner to develop his lease, transport his gas to market, and to market it for lawful purposes, just as it is interested in protecting the rights in private property of any kind. To protect such rights every State has enacted statutes against the crimes of theft, conversion, swindling, robbery, and other violations of private property rights; but because a statute can and should protect a citizen against the theft of his horse by another citizen is no reason why the State should have the power, under the Constitution, to force the second citizen to purchase the horse of the former. Appellants, of course, contend that but for the statute and orders appellees and other pipe lines would take the gas of the owners of other wells. The record does not sustain that contention; but if at any time in the future appellees or any other pipe lines should come into possession of any

gas now belonging to other well owners, it will be due to the migratory and transitory nature of natural gas in the formations of the earth, combined with the failure of other owners to exercise their correlative right to produce and market this gas.

Railroad companies cannot be required to permit a hackstand on their properties merely because the convenience of the public would be served. The court, in considering that question in *Delaware, etc., R. R. Co.* v. *Morristown,* 276 U. S. 182, 72 L. E. 523, made the observation, very pertinent here, that:

> "Assuming, under the circumstances, the creation of the public hack stand would be a proper exertion of the police power, it does not follow that the due process clause of the Fourteenth Amendment would not safeguard to the owner just compensation for the use of its property."

Railroad companies cannot be required to install cattle weighing scales at railroad stations for the convenience of the public, *Great Northern R. R. Co.* v. *Cahill,* 253 U. S. 71, 64 L. E. 787; nor to construct an underpass solely for the convenience and benefit of the land owner in the use of his own lands lying on both sides of the road, in the absence of any dangerous condition of the surface crossing. *Chicago S. P. M. & O. R. R. Co.* v. *Holmberg,* 282 U. S. 162, 75 L. E. 270. Even if the interest of the public justify an order for the construction of an underpass, any order which requires the railroad company to pay an arbitrary and unreasonable portion of the necessary expense for the construction of the underpass has been held to be a taking of property in violation of the Constitution. *National C. & S. L. R. R. Co.* v. *Walters,* 294 U. S. 405, 79 L. E. 949.

This principle was applied in *Railroad Retirement Board* v. *Alton R. R. Co.,* 295 U. S. 330, 357, 79 L. E. 1469, 1480. We quote from the opinion:

> "The railroads are not only liable for their own

> contributions, but are, in a measure, made insurers of those of their employees. This appears to be an unnecessarily harsh and arbitrary imposition, if the plan is to be what on its face it imports, a joint adventure with mutuality of obligation and benefit. * * * There is no warrant for taking the property or money of one and transferring it to another without compensation, whether the object of the transfer be to build up the equipment of the transferee, or to benefit its employees."

Zoning laws have been sustained, but in all such cases the court has pointed out that a property owner at all times has a right to show that the restrictions in question are not reasonable and have no reasonable relation to any evil concerning which the municipality is authorized to act under the police power. *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 71 L. E. 303; *Zahn* v. *Board of Public Works*, 274 U. S. 325, 71 L. E. 1074.

A statute forbidding creameries from purchasing cream at a higher price in one locality than in others is invalid. *Fairmont Creamery Co.* v. *State of Minnesota*, 274 U. S. 1, 71 L. E. 893. The following language from the opinion in that case is pertinent:

> "But all of those cases recognize the duty of the court to inquire into the real effect of any statute duly challenged because of interference with freedom of contract guaranteed by the Fourteenth Amendment, and to declare it invalid when without substantial relation to some evil within the power of the state to suppress and a clear infringement of private rights."

The same principle was recognized by this court in *U. S.* v. *Berwind-White*, 274 U. S. 564, 71 L. E. 1204, and companion cases known as the *Assigned Car Cases*, cited by appellants on page 88 of their brief and referred to in the footnote on page 127 of their brief. A casual reading of the opinion discloses at once that it is entirely without application to the question here presented. Congress enacted a statute, authorizing the I. C. C. to promulgate

rules relative to apportionment of cars among the shippers. In compliance with this statute the Commission enacted a rule requiring that all cars available be apportioned among the mines on the basis of capacity of the mines. Some of the shippers had their own cars. They attacked the rule on the theory that they had a right to use their cars and were entitled to an apportionment in addition thereto of their prorata part of the cars belonging to the railroad. The court denied the contention on the ground that since Congress had a right to exclude private cars from interstate railroads, it could prescribe the conditions on which they could be used; and held that a regulation requiring that each shipper credit his quota with the number of private cars which he was using was not a taking of property without due process. The court expressly pointed out that if one shipper were permitted to have an apportionment of cars equal to that given other shippers, and in addition thereto was permitted to use his own cars, *there would be an inequality in the use of the other transportation facilities, such as locomotives, stations, etc.*, employed by the railroad company. In other words, the court merely applied the rule prohibiting public service corporations from discriminating among those who seek to use its facilities.

The same distinction applies to the opinion in *U. S.* v. *New River Co.*, 265 U. S. 533, 68 L. E. 1165, in which this court sustained a rule of the I. C. C. limiting the owner of a mine served by two carriers to the gross daily rating of the capacity of the mine as compared with the rating of other mines. It was held that it is not material whether a mine is served by one road or more than one road; that it may select the carrier from which it accepts cars for shipments and adjust the connections and markets it desires to have; but that the Commission has power to limit it in the proportion of cars delivered to it as is represented by the rated capacity of the mines. As in the *Assigned Car Cases*,

this case was based on the rule that public service corporations cannot discriminate among those served by them.

Appellees are in no such situation as were the railroads in the cases just referred to. Their pipe lines were constructed and are used by them solely to transport their own gas from their own private reserves to their own private markets. They have not dedicated their lines to the public and cannot be required to do so. *U. S.* v. *Uncle Sam Oil Co.*, 234 U. S. 548, 562, 58 L. E. 1459, 1471; *Frost* v. *R. R. Commission*, 271 U. S. 583, 70 L. E. 1101; *Michigan Public Utilities Commission* v. *Duke*, 266 U. S. 570, 67 L. E. 45. It is worthy of note that even among the railroads, which are public service corporations, the I. C. C. cannot require that one road permit its cars to be used by other roads without the payment of adequate compensation for such use. This was expressly held in *C. R. I. & P. R. R. Co.* v. *U. S.*, 284 U. S. 80, 96, 76 L. E. 177, 186, in which the court said:

> "A regulation which is so arbitrary and unreasonable as to become an infringement upon the right of ownership constitutes a violation of a due process of law clause."

In the same case this Court used this very pertinent language:

> "Short lines, as well as trunk lines, participating in joint rates, must furnish their share of the equipment; if they do not own cars, they must rent them."

In *Panhandle Eastern Pipe Line Company* v. *Highway Commission*, 294 U. S. 613, 79 L. E. 1090, this Court had under consideration a Kansas statute providing that whenever any pipe line or telephone line, etc., was installed in the highway it must be removed at the cost of the owner. After the pipe line company had laid its pipe line along its right-of-way easement, the Kansas Highway Commission acquired a highway right-of-way from persons owning the land across which the pipe line company had laid its line.

The Highway Commission ordered the pipe line company to remove its pipe line at its own expense and on its refusal to do so except at the expense of the Highway Commission, the latter obtained a writ of mandamus in the Kansas Supreme Court ordering the pipe line company to remove its line. This Court reversed the decree of the Kansas Supreme Court and in the course of its opinion said:

> "The police power of a state, while not susceptible of definition with circumstantial precision, must be exercised within a limited ambit and is subordinate to constitutional limitations."

In *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 67 L. E. 322, this Court pointed out that, while the use of property is subject to some limitation, the power to limit the use must have its limits "or the contract and due process clauses are gone." The case involved a statute forbidding the mining of coal in any way as to cause subsidence of any human habitation. This Court struck down the statute because it rendered commercially impractical the removal of the valuable deposits of coal still unmined. In its opinion the Court said:

> "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. * * * In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders. *Spade* v. *Lynn & Boston R. R. Co.*, 172 Mass. 488, 489. *We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.*" (Italics ours.)

In the recent case of *Louisville Joint Stock Land Bank* v. *Radford* (involving the Frazier-Lemke Act), 294 U. S. 356; 79 L. E. 920, this Court recognized the principle under discussion in the following language:

> "If the public interest requires, and permits, the

> taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public."

See also: *Loan Association* v. *Topeka,* 20 Wall. 655, 662, 664, 22 L. E. 455; *Ochoa* v. *Hernandez,* 230 U. S. 139, 161, 57 L. E. 427; *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 336, 37 L. E. 463.

Applying this principle, if the owners of other wells desire to participate in the markets for natural gas, they must furnish their share of the equipment to transport such gas to market. If they do not own such equipment, they must provide it for themselves. Likewise, if they do not own the markets, they must negotiate markets for themselves.

The Supreme Court of Texas has frequently announced the same rule in determining the validity of proceedings, whether attacked as being in violation of the due process clause of the Fourteenth Amendment, or in violation of similar clauses of the State Constitution, which appellees plead in this case. A leading case by that court is *M. K. & T. R. R. Co.* v. *Rockwell County Levee Improvement District,* 117 Tex. 34, 297 S. W. 206, in which the defendant was contesting the validity of certain condemnation proceedings. Referring to the power of eminent domain the court said:

> "But even this greater power of the state is not itself without limitations, for no exigency of the moment can justify the Legislature, or any other instrumentality of government, in depriving the citizen of his property without due course of law, or depriving him of that equal protection of the law, vouchsafed to him by the fundamental law of the land. This limitation applies as well to legislative acts as to administrative or judicial proceedings. * * *
>
> "To be justified under the authority of the police

> power, the thing complained of, whether a legislative act, judicial decree, or proceeding whatsoever, must be reasonable under all the circumstances. Otherwise it may be an unlawful interference with the property and rights of the individual whom it hurts. Ordinarily this question of reasonableness is one of law; perhaps it is always such."

In the light of these authorities, we respectfully submit that it is wholly arbitrary and unreasonable to require appellees and others similarly situated to bear the entire burden of providing market outlets and transportation facilities for all owners of gas wells in the Texas Panhandle as a means of advancing what appellants assume is in the interest of the public, but which is in fact in the private interest of the owners of other wells.

Appellants ask the question (p. 127, appellants' brief), "What is the basis of appellees' right to produce gas?" They answer it by asserting that it is not because they own contracts with affiliated pipe line systems, booster stations and markets, but that they have this right by virtue of their ownership of gas producing lands and because of their ownership of wells thereon. Appellants overlook the fact that appellees not only have a right to produce their gas, but that they have a right to transport it to market and to sell it for lawful uses. They had that right the moment they acquired their leases. That right did not attach after they drilled their wells. The drilling of their wells, the building of their pipe lines, and the negotiating of their markets were simply the successive steps they took to enable themselves to exercise their rights in the gas underlying their leases. By virtue of the peculiar character of gas already pointed out, appellees could not exercise their right to produce and market their gas until they had negotiated private marketing contracts and constructed a pipe line connecting their wells with the points of delivery under such marketing contracts. It was just as essential for

them to provide themselves with the markets and with the pipe lines as it was to drill their wells. The pipe line companies, which have wells, pipe lines and markets, have no superior rights as compared with the rights of those who have no markets and no pipe lines but who have wells, nor does the owner of a well have any superior rights when compared with the owner of a tract of land or a lease in the gas field on which no well is drilled. The rights of all three are exactly the same. The only difference in the three classes of owners is that the appellees and other pipe lines have taken all the steps necessary to enable them to exercise their legal rights, the well owners have taken only one of these steps, and the others have taken none of these steps; but in all that they have done, the pipe lines have in no sense interferred with the rights of the others to do likewise.

Appellants point out (page 128 of their brief) that the operation, on the whole, of the statute interferes with the business of other owners as well as appellees and other pipe lines similarly situated; that those who have erected carbon black plants in the sweet gas areas have been forced to close them or move them to the sour gas area; that the strippers have been forced to close down; that producers who have been selling their sweet gas to carbon black plants and others who have been selling their gas, both sweet and sour, to stripping plants can no longer do so. Certainly, because if those persons continued to operate as they did prior to the enactment of House Bill 266, they would be making a wasteful and forbidden use of their gas. They would be guilty of using their gas for purposes that have been declared by the statutes to be wasteful. *Walls* v. *Midland Carbon Co.*, 254 U. S. 300, 65 L. E. 276; *Henderson* v. *Thompson*, 14 Fed. Sup. 328; *Henderson* v. *Railroad Commission*, 56 Fed. (2) 218.

Appellants comfort themselves with the observation that the provisions of the law which closed down the stripping plants and confined the carbon black plants to the use of sour gas are immensely valuable to appellees in the preservation of their reserves (page 128). Are not appellees and the other pipe lines entitled to this protection? Must a citizen, in order to obtain protection against the waste and destruction of his private property, be required to submit to the losses and burdens that would be visited upon appellees and others similarly situated if they be required to divide their private marketing contracts and their pipe line facilities with those who were guilty of the practices which the State has seen fit to condemn? Must a citizen pay for the right to the exclusive shelter of his own home against one who would intrude himself upon the premises by going to a hotel and arranging a room for the intruder?

The length of time that this controversy has been before the people of Texas and its legislatures, on which appellants comment at page 130 of their brief, is wholly immaterial. The question here is whether or not the Legislature arrived at a solution comportable with the Constitution of the United States and with the Constitution of Texas in setting out deliberately, according to the interpretation of the statute by appellants, to clothe the Commission with power to coerce appellees and those similarly situated to provide a market and pipe line facilities for the owners of other wells; and whether the Commission, in the exercise of this purported authority, by the orders attacked, can carry out any such purpose of the Legislature.

Appellants cite (page 131) *Booth* v. *Illinois*, 184 U. S. 425, 46 L. E. 623, in support of their assertion that the court will not hold a statute invalid on the theory that the Legislature might be mistaken or that the statute might even be unwise, citing in that connection *Bayside Fish Flour Co.* v.

Gentry, 80 L. E. 522, and *Pacific Coast Box & Casket Co.* v. *White,* 296 U. S. 176, 80 L. E. 133. These decisions had to do with statutes held to be within the general jurisdiction of the Legislature in that they had a reasonable relation to the general underlying object of the statute. In the *Bayside Fish Flour* case the court held that the plain purpose of the measure was to conserve for food the fish found within the waters of the State; that over these fish and the wild game of the State generally, the State had supreme control; and that to the extent that the act dealt with the use or treatment of fish brought into the State from the outside, its legal justification rested on the ground that it operated as a shield against the covert depletion of the local supply, and thus tended to effectuate the policy of the law by rendering evasion of it less easy; that those provisions had a reasonable relation to the object of their enactment, namely, the conservation of the fish supply of the State. The *Pacific Coast Box & Casket* case involved an application of the principle underlying all inspection laws, upheld under the police power for many years, beginning with the opinion in *Turner* v. *Maryland,* 107 U. S. 38, 27 L. E. 370. These cases have no application to the issues before this court.

The presumption that a Legislature understands and probably expresses the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discretion is based upon adequate grounds, stated by appellants on page 131 of their brief, is, of course, a rebuttable presumption. In the present case that presumption has been effectively rebutted by the circumstance that the trial court in its findings of fact, sustained by the overwhelming, if not conclusive, testimony, and in its conclusions of law, and even by the pleadings of appellants, it is established that the legislative motive underlying the statute under attack is to coerce appellees and others similarly situated to furnish markets and market-

ing facilities to the owners of gas wells who are without markets and marketing facilities.

Miller v. *Schoene*, 276 U. S. 272, 72 L. E. 568, cited by appellants, involved the principle which underlies the quarantine laws, upheld because they are designed and calculated to protect the health of its people, its domestic animals, or its crops against infection. It is just as logical to protect the health of fruit trees against contamination by other and diseased trees as it is to protect livestock from becoming contaminated by contagious diseases. The public interest was involved, just as it is involved concerning the confining of carbon black manufacture to sour gas. The Legislature had the right to make a choice, and its choice, having been made, will be upheld. There is nothing in the activities of the pipe lines that is comparable to cedar rust. At great expense, after years of diligent effort, they have built up a legitimate business, and their being permitted to carry on their own business will bring no infection or contamination on any man or his property.

The *Guaranty Fund Cases*, cited by appellants on page 133, are clearly without application, because of those who are required to contribute and participate in the benefits to be derived. The circumstance that a bank is solvent today does not mean that it may not become solvent as a result of future developments. Those cases are based on the principle that all of a class may, under proper circumstances, be made to contribute for a common benefit—the same principle on which the drainage cases and other similar cases are based. But, under the doctrine of these cases, a law will not be upheld where the facts show the burdens imposed on the participating banks are excessive when considered in connection with the advantages obtained, or the real interests of the public. *Abie State Bank* v. *Bryan*, 282 U. S. 765; 75 L. E. 690.

The private motor carrier cases, *Stephenson* v. *Binford*,

287 U. S. 251, 77 L. E. 288, cited by appellants, involved the right of the State to protect and safeguard its highways and the use thereof. Clearly, these cases are not in point.

Competitive conditions may be within the purview of the police power, but only when rights of one group are being violated or destroyed by others at whom the police regulations are directed. Two of the cases cited by appellants in this connection were *Nebbia* v. *New York*, 291 U. S. 502, 78 L. E. 940, and *Borden's Farm Products Co.* v. *Ten Eyck*, 80 L. E. 469, which dealt with a subject of an entirely different character from that involved here. The supply and quality of milk was seriously threatened through the destruction of the local price structure upon which the farmer engaged in producing milk depends for his livelihood. Those brought within the purview of the law were dealt with in order to keep the industry itself from being destroyed. The public had an interest in preventing the destruction of a great industry, just like it had an interest in preventing the destruction of this great gas reserve through waste by those whose interests are served by the statute and orders here attacked. The *Nebbia* and *Borden* cases are authority supporting the power of the Legislature to stop this destruction. No such situation is presented by the statute and orders attacked by appellees. They are not threatening the gas business with destruction. They have developed the gas business—all the gas business there is in the Panhandle. They have done nothing to prevent others owning gas wells from developing other markets and further gas business. The only destruction that has been wrought has been by those who are now clamoring for the right to appropriate a substantial interest in the business that appellees and other similarly situated have developed, and appellants' position is that unless such persons be permitted to appropriate an interest in this business, to the building up of which they have contributed

nothing, they will have to be permitted to destroy the gas business by wasting the supply of gas upon which the pipe lines must rely for the carrying on of their business. This Court did not hold that a Legislature had a right to bring about a more happy situation by taking from those who have not offended their property and conferring it upon the offenders.

Let us see the extent to which appellees would be required to divide their marketing contracts and their pipe line facilities under the operation of the statute and orders. Under the order effective at the time Texoma's suit was filed, that company had a market outlet for 117,632,000 cubic feet daily, but was permitted to produce only 77,000,000 cubic feet daily from its own wells (R. 534). It was required, therefore, to purchase 40,632,000 cubic feet of gas daily in order to meet its market requirements. In one year it would have had to purchase 14,830,680,000 cubic feet of gas. After this suit was filed, the Railroad Commission changed its views as to a "reasonable basis"; and, as already stated, under the orders of December 10th and December 18th, effective at the time the case was tried, Texoma was required to purchase only about 14,000,000 cubic feet of gas daily, or 5,110,000,000 cubic feet a year. Consolidated was required to purchase 17,000,000 cubic feet daily, or 6,205,000,000 cubic feet a year. Even under the orders applicable to the month of January, during which the case was tried, the interest in their markets and in the use of their pipe lines of which they would have been deprived for the use and benefit of other well owners was stupendous. And what would hinder the Railroad Commission, after this case shall have been finally terminated, from again changing its mind about a "reasonable basis" for the distribution of gas and so "adjust the allowables" as to again compel Texoma to purchase 40,000,000 cubic feet of gas daily?

8. THE NECESSARY OPERATION AND EFFECT OF THE STATUTE AND ORDERS IS TO DENY APPELLEES THE EQUAL PROTECTION OF THE LAW IN THEIR PROPERTY RIGHTS, IN VIOLATION OF THE FOURTEENTH AMENDMENT.

9. THE NECESSARY OPERATION AND EFFECT OF THE STATUTE AND ORDERS IS TO DEPRIVE APPELLEES OF THEIR LIBERTY OF CONTRACT IN THE SALE OF THEIR GAS, WITHOUT DUE PROCESS OF LAW.

10. THE NECESSARY OPERATION AND EFFECT OF THE STATUTE AND ORDERS AS APPLIED TO THE PANHANDLE GAS FIELD IS TO CAUSE DISPROPORTIONATE WITHDRAWALS OF GAS FROM THE COMMON RESERVOIR. THEY CANNOT BE SUSTAINED, THEREFORE, AS MEASURES TO PREVENT DISPROPORTIONATE WITHDRAWALS.

Subdivisions 8, 9 and 10 are all sustained by the same facts and the same authorities we have discussed in support of Subdivisions 1 to 7, inclusive, of this Division of the brief. To go over the facts and authorities applicable to these points, therefore, would be to repeat for the most part what we have already said under the other points above mentioned. This it is neither necessary nor proper to do. We shall merely point out very briefly the application of each of this group of points to the facts.

The trial court held in its conclusions of law that appellees and those similarly situated are denied the equal protection of the law under the necessary operation and effect of the statute and orders. (R. 185). They are denied protection against drainage of large quantities of gas from their wells to the existing low pressure areas, while the producers of sour gas, the oil producers and the other producers of sweet gas, under the protection of the statute and orders, will continue to produce at proportionally much greater rates, based on ownership in the reservoir, than will appellees and those similarly situated. Appellees, who have purchased leases, drilled wells, constructed pipe lines

and connections and developed market outlets for producing, transporting and selling their gas, are denied protection of their right to produce and market a large proportion of their gas, 14,000,000 cubic feet daily in the case of Texoma and 17,000,000 cubic feet daily in the case of Consolidated, which but for these orders they would be able to market. This would place them at great disadvantage with other owners, who, without being required to make the same character of investments, would enjoy the same benefits and privileges as those who have made these investments. The constitutional provision guaranteeing equal protection of the law operates to place and keep all persons of the same class on an equal basis, guaranteeing to each the same rights and the same opportunities enjoyed by the others, without placing upon one or more of the class any burden that is not common to all.

In a number of cases above cited and discussed the courts pointed out that the right to use and the right to sell one's property are essential elements of ownership, without which there is no complete ownership of property. *Forster* v. *Scott, Lochner* v. *New York, Fairmont Creamery Co.* v. *State of Minnesota,* and *Warner Quinlan Asphalt Co.* v. *Carlisle,* supra. Taking a part is as much forbidden by the Constitution as taking the whole. The difference is only one of degree. *Eaton* v. *Ry. Co.* supra.

The liberty of contract provision of the Constitution guarantees to the owner of property his right and liberty to contract with reference to the use or disposition of his property. It is readily apparent that, under the necessary operation of the statute and orders under attack, appellees and those similarly situated are definitely deprived of that liberty of contract. Suppose, for instance, that one of appellees, or some other pipe line company similarly situated, should desire to go into the great State of Wisconsin,

where no natural gas is now being sold, for the purpose of developing a new market for gas. This undertaking would require the employment of competent persons to negotiate with prospective customers (R. 203). If it was desired to sell gas at wholesale to local concerns now distributing artificial gas, it would be necessary to conduct prolonged negotiations with such concerns, and to convince them with engineering data showing the costs involved in a change from artificial gas to natural gas, chemical data showing the comparative fuel values of natural and artificial gas, and economic data showing the economic advantages of using natural gas at the proposed prices. All of this would involve substantial expenditures of time, skill and money. In negotiating with industrial users, it would be necessary, as this record shows, to demonstrate to prospective customers the advantages of using natural gas rather than coke oven gas, coal, oil, or other fuel already in use. As an inducement to any prospective customer, whether a distributor or an industrial user, it would be necessary for the pipe line company to give assurance of its ability to deliver gas at any hour of the day in the quantities necessary to meet the requirements of the consumers. Unless such assurance can be given, the customer would not take the risk of incurring the heavy expense involved in discarding his present equipment and installing equipment for the burning of natural gas. To enable it to give this assurance, it is necessary for the pipe line company to own large reserves of gas, which represent very substantial investments, as this record shows. The uncontradicted testimony of the witnesses Floyd C. Brown (R. 203-212) and E. C. Joullian (R. 212-219) shows the facts just stated. If through these negotiations the pipe line company succeeds in obtaining additional marketing contracts, it would then have to build a pipe line into the State and to the cities and towns where these marketing contracts were performable. This would

involve a tremendous investment, as this record shows. Under these orders, who would receive the reward, if any, for the foresight, the initiative, the time and skill employed in negotiations and the investments of money in the development of the new market? Would the company which made these expenditures be permitted to drill additional wells on its leases, produce its gas, transport it through its pipe lines and deliver it in performance of these new marketing contracts? No. On the other hand, it would have to divide the uses and rewards of these new facilities and private contracts with every other owner of a gas well in the Panhandle field, none of whom has made the slightest contribution to the investments involved, *and in order to divide these benefits it will be forced to build pipe lines to the wells of these other owners!* In other words, the fruits and benefits of the individual efforts and private investments of appellees and others similarly situated in the development of new markets and in the construction of new pipe lines, if needed, must be distributed among all the owners of gas wells in the field, leaving to the successful pipe line company only such part of the uses and benefits as the Railroad Commission shall permit. This is not liberty. It is communism.

There can be no question under the evidence already pointed out and discussed but that the necessary operation and effect of the statute and orders is to aggravate rather than prevent disproportionate withdrawals of gas. Even if, as appellants contend, the Legislature and the Commission had the general authority, in the proper exercise of the police power, to enter orders prohibiting disproportionate withdrawals, the statute and orders are arbitrary and unreasonable as applied to appellees and others similarly situated. They necessarily subject appellees and those similarly situated to tremendous drainage to the low pressure areas now existing. These low pressure areas would be

aggravated and extended through the disproportionate withdrawals of gas in the sour gas area, in the areas of lower pressure in which the wells not now connected to pipe lines are located, and in the oil fields under the provisions of the order purporting to regulate the gas-oil ratios. The fact is, as we have seen, that these orders expressly permit the taking of enormous quantities of gas from oil wells in the comparatively small areas productive of oil, in the taking of more than 520,000,000 cubic feet daily (R. 498) from 211 sour gas wells located on leases aggregating 33,750 acres (R. 177), and in the taking of approximately 20% of the entire production of sweet gas in the West Panhandle field from 180 wells located on 30,096 acres, while the other 80% of the total production of sweet gas in the West Panhandle field would be taken from 293 wells scattered over leases aggregating 523,063.97 acres (R. 176-177). The situation is substantially the same in the East Panhandle field. It is too obvious for argument that the contention by appellants that the statute and orders can be justified on the ground that they prevent disproportionate withdrawals is absolutely without basis in this record.

11. THE STATUTE AND ORDERS SERVE NO PUBLIC INTEREST, BUT WERE INTENDED TO OPERATE, AND IN FACT WOULD OPERATE, TO SERVE THE PRIVATE INTERESTS OF ONE GROUP OF OWNERS AT THE EXPENSE OF ANOTHER.

The trial court held that the statute and orders serve no public interest (R. 185); that they operate to take, damage and destroy appellees' property for a purported public, but in fact private, use, without compensation and without their consent (R. 185).

We have already demonstrated that the statute and orders were intended to, and in their necessary operation and

effect would, coerce appellees and those similarly situated to divide their markets and marketing facilities with others, who have failed to provide themselves with their own markets and marketing facilities. What interest could the public have in *providing these other owners with a means of exercising* their right to produce and market their gas?

Appellants in their brief (pp. 135-143) make the contention that the public interest in a long continued supply of gas for light and fuel sustains the statute. The taking of great quantities of natural gas by drainage and substantial interests in the pipe lines and private marketing contracts of appellees and conferring these on other owners would not have the slightest tendency to effect a long continued supply of natural gas for light and fuel purposes. Those provisions of the statute which prohibit the popping of gas to the air and other forms of gas wastage, both overground and underground, and which limit the manufacture of carbon black to the burning of sour gas do serve a public interest by preventing the waste of sweet gas and sour gas and by preventing the use of sweet gas for an inferior purpose, such as the manufacture of carbon black; but these public interests could have been served by the Legislature by the terms of the statute not under attack, without imposing upon appellees and those similarly situated the illegal and unconstitutional burdens resulting from the operation of the provisions attacked. A Legislature or an administrative body cannot accomplish a lawful purpose or a desirable result by a resort to unlawful and unconstitutional means. *Meyer* v. *Nebraska*, 262 U. S. 390, 67 L. E. 1042. There is no question but that the conditions obtaining at the time House Bill 266 was enacted would have soon exhausted the entire reservoir and rendered worthless the investments of appellees. The public had an interest in preventing this threatened destruction of the greatest gas field yet discovered; and the Legislature, in enacting those pro-

visions of House Bill 266 not here under attack, was unquestionably serving the public interest; but the provisions of the act here involved had only to do with the interests of private owners who had failed to exercise the diligence required of business men to protect their investments and put them on a profitable basis.

Appellants assert that the Legislature had any one of three courses open to it: first, that it could have allowed the existing conditions to continue; second, that it could have enacted a statute which restricted the use of sweet gas to light and fuel purposes, which they say, without justification we shall show, would have the effect of dedicating to the pipe line producers all the sweet gas in the Panhandle reservoir; and, third, that it could have passed a law which adequately protected the interest of the public by restricting the use of sweet gas, thus prohibiting the harmful waste which was taking place, and at the same time it could provide for a system of "ratable production," which would allow each surface owner in the common reservoir to produce a fair share of the total gas produced—which is appellants' way of saying it could force the pipe lines to furnish markets for all. It will be noted that the clause in the third suggested course, in which the term "ratable production" was used, does not qualify the expression, "law which adequately protected the interest of the public." Unconsciously, no doubt, appellants, by the very wording of the third possible choice by the Legislature, in effect, concede that the public interest could be protected by restricting the use and prohibiting the waste, and that in providing for what they call "ratable production" it could add something to the provisions protecting the public interest—though they neglected to say that the portion tacked on would be for the benefit of private individuals. The context of their discussion shows that they realize the inter-

ests of the general public would have been fully served by adopting the second choice.

We have already pointed out that there is no basis in the record for the statement that appellees and those similarly situated have a monopoly on the market for sweet gas. We have never asserted, and do not now assert, that it is beyond the power of the Legislature to set up a system whereby those who own interests in the sweet gas producing portion of the field other than the pipe lines may make beneficial use of their gas. Appellees will be glad to see the owner of every other gas well in the field make a beneficial use of his gas, and will be glad to see him exercise his right to produce his gas for lawful purposes without waste and dissipation; but appellees are not willing to furnish to these other owners the means of exercising such right.

Appellants repeatedly make the assertion in their brief in words and by necessary implication that the Legislature had the right to enact a statute restricting the production of gas from appellees' wells to prevent appellees' neighbors from being forced into wasteful surface operations to secure some outlet for their gas. This position is utterly untenable. No one will be forced to resort to wasteful uses of his gas because appellees and others similarly situated refuse to furnish them the means of transportation and the markets necessary to sell their gas for lawful purposes. The record does not show the slightest effort on the part of any of the owners of other wells to develop market outlets and construct transportation facilities. All they have ever done is to demand of the pipe lines a market for their gas and demand of the Legislature and the Railroad Commission that legislation be enacted and orders promulgated that will force the pipe line companies to furnish them a market.

As already pointed out, *Champlin Ref. Co.* v. *Corpora-*

tion Commission and *Nebbia* v. *New York* have no application to the situation presented here.

In a number of places in their brief appellants assert that appellees have received great benefits from those provisions of the statute prohibiting waste and limiting the manufacture of carbon black to sour gas. Without directly taking that position, they assert, by necessary implication, that appellees are compensated for the taking of their property by the protection afforded their own gas reserves. If the use for which appellees' property would be taken under the operation of the statute and orders were a public one, the Legislature has no power to determine the adequacy of the compensation which it or an administrative body may allow in taking property for a public use. That is a purely judicial function, under the Constitution, and does not rest in the legislative body. Would the taking of an owner's property for a public road under a statute allowing $5.00 an acre be sustained if its value in fact turned out to be $100.00 an acre? When property is taken for a public use, there must be paid compensation, even though by reason of the taking the property owner sustains incidental benefits common to others. Appellees and others similarly situated have received no greater benefits from the stopping of waste and from the limitation of carbon black manufacture to sour gas than has every other owner in the field. They can not be required to pay for that compensation by submitting to the taking of their gas, their pipe lines and their markets, or any substantial interest therein. There can be no question but that this taking of appellees' property violates the due process clause of the Fourteenth Amendment. The due process provision of the Texas Constitution is even more stringent than that of the due process clause of the Fourteenth Amendment. Article I, Section 17, of the Texas Constitution reads:

"No person's property shall be taken, damaged or

destroyed for or applied to public use without adequate compensation being made, unless by consent of such person; and, when taken, except for the use of the State, such compensation shall be first made or secured by a deposit of money."

The fact that, as a result of the taking, the remaining property of the owner is increased in value is immaterial. *B. B. B. & C. R. R. Co.* v. *Ferris*, 26 Tex. 588, *Dulaney* v. *Nolan Co.*, 85 Tex. 225, 20 S. W. 70. The enhancement of the value of residence property in a city arising from the construction of a railroad cannot be offset against the value of the land taken for its construction. *Eastern Texas R. R. Co.* v. *Eddings*, 111 S. W. 777. Nor will it suffice that the owner receive benefits in common with other property owners. *Pochilla* v. *Calvert, etc., R. R. Co.* 72 S. W. 255. Under the Texas Constitution it is required that the owner whose property is taken for a public use be first compensated in cash, *not in real or imaginary benefits. Southern Cotton Press Co.* v. *Galveston Wharf Co.*, Wilson, Civil Cases, Vol. 3, Sec. 256. The taking must be for a public—not a private—use, whether for a particular individual or for a number of individuals. Thus, a road cannot be laid out across one's land for private uses. *Mosely* v. *Bradford*, 190 S. W. 825; *Leathers* v. *Cragg*, 228 S. W. 995. The Supreme Court of Texas, in considering this constitutional provision, has laid down rather a stringent requirement that the use be a public and not a private one. Thus in *Borden* v. *Tres Palacios Rice Co.*, 98 Tex. 494, 86 S. W. 11, the court said:

"Property is taken for public use, as intended by the Constitution, only when there results to the public some definite right or use in the business or undertaking to which the property is devoted, and we further agree that this public right or use should result from the law itself and not be dependent entirely upon the will of the donee of the power. * * * We are not inclined to use that liberal definition of the phrase

> 'public use' adopted by some authorities which make it mean no more than the public welfare or good, and under which rule any kind of extensive business which promotes the prosperity and comfort of the country might be aided by the power of eminent domain."

Manifestly, the taking of property from appellees evidenced by the record here does not meet the test of a public use provided in the Borden case. The trial court has properly so held.

Appellants in several places assert that the effect of the statute is to dedicate all the sweet gas in the reservoir to the use of the pipe line companies. The uncontradicted evidence entirely disproves that assumption. The statute expressly permits the use of sweet gas for efficient chemical manufacturing purposes other than the manufacture of carbon black, for introduction into the oil horizon to increase the ultimate recovery of oil, and for the extraction of natural gasoline when the residue is returned to the horizon from which it is produced (appellants' brief, pp. 248-249).

The record does not disclose any demand for use of a substantial quantity of sweet gas for any of those purposes; but the evidence does not show that there will never be a demand for those purposes. The dedication is not to the pipe line companies, but to those who will exercise the initiative and diligence and make the investments enabling them to exercise their right to utilize sweet gas for one of the lawful purposes prescribed in the statute.

The restricting of carbon black manufacture to sweet gas under the wording of the statute is defeated by the necessary operation of the statute and orders; for great volumes of sweet gas have already migrated to the sour gas area, and, as already pointed out, the migration of sweet gas to that area will continue for an indefinite period, according to the trial court's findings and the

undisputed testimony. Indeed, it will continue as long as carbon black is manufactured; for the sour gas area is, for the most part, already a low pressure area, and the disproportionate withdrawals in that area will continue and aggravate the pressure differentials. Under these circumstances, it is inevitable that a very large proportion of the sweet gas, including, of course, the same proportion of the gas of appellees and others similarly situated, will be drained off to the sour gas area, blended with sour gas, and produced for the manufacture of carbon black. It is idle, therefore, to say that in the absence of the provisions of the statute and orders here attacked, the entire sweet gas reserves of the Panhandle will be dedicated to the use of the pipe lines. Their assumptions of fact, therefore, are wholly erroneous, even if appellants were standing on solid legal ground. It is clear, however, that under the Fourteenth Amendment and the due process clause of the Texas Constitution, the benefits which appellants assume appellees would receive do not sustain or justify the taking of appellees gas, their markets or their transportation facilities, to the end that others may be supplied with markets and transportation facilities.

12. SINCE THE PROVISIONS OF THE STATUTE UNDER ATTACK, IF SEPARATELY ENACTED, WOULD BE INVALID, THEY ARE NOT RENDERED VALID BY REASON OF THE CIRCUMSTANCE THAT THEY ARE INCLUDED IN A STATUTE THAT DOES CONTAIN VALID PROVISIONS.

As appellants interpret House Bill 266, it is clear that this act has two distinct objects: one dealing with the problem of preventing wasteful production and use of gas, and the other dealing with the matter of providing markets for the owners of gas wells who have no market outlets. Throughout their brief appellants belabor themselves in an effort to support the latter division by advancing arguments in support of the validity of that part of the law

which operates to prevent the wasteful production and use of gas. We have consistently concurred in the view that those provisions of the statute which prevent wasteful production and wasteful utilization are valid. There can be no question that such provisions fall within the proper exercise of the police power by the State.

Several times appellants present the argument that the Legislature would not have adopted that portion of the bill which prohibits wasteful production and wasteful utilization without a requirement that those producers owning pipe lines divided their markets with other owners. On page 40 they refer to the circumstance that House Bill 151 (R. 381), which prohibited wasteful production and wasteful utilization but did not contain those provisions here under attack, was not enacted. On this circumstance they argue that the provisions of the statute requiring appellees and those similarly situated to furnish markets and marketing facilities for the owners of other wells must be sustained because the Legislature found it proper to provide markets for the owners of all gas wells in the field in order to justify its prohibition of wasteful production and wasteful utilization (appellants' brief, pp. 40-41). On page 139 they express a doubt that "the Legislature will ever be willing to allow to remain in force regulations which deprive all but the pipe line producers of the right to enjoy a benefit from their property." It is apparent that in expressing this "doubt" appellants mean subtly to suggest that, unless the pipe lines can be coerced into dividing their markets, the Legislature will repeal those provisions prohibiting the deplorable waste of gas that prevailed when the statute was enacted, and allow the whole reservoir to be destroyed. If we may be allowed to express a doubt in the same connection, we seriously doubt if those who wrought such havoc through the stripping of gas and wasting 97% of its fuel value to

the air could again prevail on the Legislature to sanction any such performance. Our doubt is based on the record in this case, which shows conclusively that the Legislature did not intend to condition the validity and enforcement of those provisions of the statute directed against wasteful production and wasteful utilization to depend upon the fate in the courts of the provisions of the statute hereunder attack. Section 26 of the statute reads as follows (appellants' brief, pp. 258-259):

> "If any section or sections, clause, sentence or provision of this Article should, for any reason, be held to be invalid or unconstitutional, it shall not in any wise affect the remaining parts of this Article not so held, and all that portion not held invalid shall remain in full force and effect."

The parties stipulated in connection with the introduction of House Bill 151 above mentioned that amendments, the effect of which was to make the validity of the waste prevention provisions of the bill finally passed, to-wit, House Bill 266, depend upon the validity of the "ratable production" provisions, were voted down by each of the two houses of the Legislature at the time it was considering House Bill 266 (R. 423). Thus it appears that, while the Legislature, in response to the demands of those who had failed to make provision for the marketing of their own gas, might have been willing, if appellants correctly construe the statute, to go as far as it could to serve these private interests by trying to coerce the pipe lines into providing them with a market, it was not willing to involve the public interest in conserving this great gas field with the chance that those provisions in the interest of private individuals might be held invalid.

It is apparent that, while the Legislature had no doubt as to the validity of those portions of the law which prohibit waste, similar provisions having been consistently upheld by the courts, it did realize that, in enacting the

provisions here under attack, it was entering a questionable field. It, therefore, took the precaution to insert Section 26 to the end that the prohibitions against waste should not fail in the event the other provisions should be struck down.

This character of saving clause is frequently inserted in comprehensive statutes; and it has been uniformly upheld. *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165, 76 L. E. 1038; *Crowell* v. *Benson,* 285 U. S. 22, 76 L. E. 598; *United States* v. *United Shoe Machinery Co.,* 264 Fed. 138; *Love* v. *Wilcox,* 119 Tex. 256, 28 S. W. (2) 515; *Grasso* v. *Cannon Ball Motor Fgt. Lines,* 81 S. W. (2) 482.

The rule is just as clearly established that those provisions of a statute, which alone would be invalid because outside the limitations of a proper exercise of the police power, will not be sustained because other portions of the statute are within the limits of the proper exercise of police power. Mr. Justice Grier, in the *Passenger Cases,* 7 Howard 283, 458, 12 L. E. 702, 755, aptly applied this rule in the following terse language:

> "Its true character cannot be changed by its collocation, nor can it be termed a police regulation because it is in the same act which contains police regulations."

That rule is a complete answer to the contention of appellants on this point.

13. THE STATUTE AND ORDERS ARE ARBITRARY AND UNREASONABLE AS APPLIED TO APPELLEES AND OTHERS SIMILARLY SITUATED IN THAT THEY MAKE NO PROVISION FOR AND TAKE NO ACCOUNT OF THE GAS UNDERLYING THE LANDS AND LEASES BELONGING TO APPELLEES AND OTHERS SIMILARLY SITUATED ON WHICH NO WELLS HAVE BEEN DRILLED, IN EXCESS OF 640 ACRES FOR EACH WELL IN THE WEST PANHANDLE FIELD AND 160 ACRES FOR EACH WELL IN THE EAST PANHANDLE FIELD.

The clear purport of the statute is to confine the allocation of gas among only the owners of wells, in that the allocation to such owners shall take into account only lands on which wells are situated. The statute further provides that the Commission shall not take into account the size of the tract upon which any gas well is located in excess of the drainage area of such well or wells producing at 25% of the daily productive capacity, which drainage area shall be determined by the Commission. The orders on their face show and the trial court found that no provision was made for and no account was taken of the leases belonging to the pipe lines or others on which no wells have been drilled, and that no provision was made for or account taken of producing acreage included within large leases in excess of 640 acres in the West Panhandle field and 160 acres in the East Panhandle field for each well (R. 179-180). In its opinion the trial court, in commenting on this question, said (R. 158-159):

> "By force of this doctrine (the police power) it may be that by a complete, a comprehensive, scheme which, consistent with due process, considers and has due regard for the rights and equities of all, the Legislature of Texas may be able to provide by law for an equitable ascertainment, partitioning and fixing of them, so that each could take only what was thus determined to be his own. We do not say that it cannot do this. We say merely that it has not done so. We say that House Bill 266 cannot be said to have either this object or this effect. In the first place, it con-

siders only wells actually drilled. No cognizance is taken of the great amount of undrilled territory. In the second place, even as to wells already drilled, it makes no provision for a definite and final ascertainment, partition and setting aside to each owner of the amounts he is entitled to draw from the reservoir. It provides merely for a temporary, and therefore arbitrary, allocation to each well owner of a part of the contract market of some of them. The evidence makes it plain that complainants (appellees) have been taking gas in an orderly fashion and in a total far less than under any equitable theory of measurement would be apportioned to them, while some of those in whose interest, under the notion of correlative right, the orders seek to administer the act, have been taking it exorbitantly, disproportionately and wastefully. No provision is made in the Act for taking into account these and many other matters which must be considered if any equitable and fair distribution between adverse interests is to be attempted."

On pages 238 to 241 of their brief, appellants assert that failure of the statute and orders to give credit for undrilled acreage does not militate against their validity. One of their arguments is that many oil proration orders have been sustained which divide the field allowable among the various wells in the field on a basis of relative potentials, with no consideration being given to the size of the tracts on which the wells are located. They do not state the cases upholding such orders, and, if there be such cases, it would be necessary to inquire into the facts involved and the questions raised to determine whether such cases would be in any sense applicable to the facts here. In this case it is perfectly clear that appellees and others similarly situated have sustained appalling losses by reason of drainage that has already occurred as a result of the exorbitant and disproportionate production by those whom the trial court in its opinion referred to as "those in whose interest, under the notion of correlative rights, the orders seek to administer the act." The record is un-

disputed that it was necessary for appellees and other pipe line companies to acquire their reserves of acreage; that they would not have been able to build their pipe lines or negotiate their marketing contracts but for the circumstance that they had gas to transport and sell. The court will take judicial knowledge of the fact that a project involving the large investments necessary in a gas pipe line project must, if profitable, be operated over a long period of years to enable the owners to amortize their investment during the period that the expensive facilities and equipment are being depreciated.

It is neither necessary nor desirable, the facts show, for appellees and other pipe lines to drill a well on each 640 acres in the West Panhandle field and on each 160 acres in the East Panhandle field. The drilling of such wells would involve large and unnecessary investments of money and would be utterly useless in meeting the market requirements of appellees. What justification would there be for requiring Texoma to drill 309 wells (one well to each 640 acres of its 198,200 acres) when its 90 wells located on 81,928.44 acres, produced at about 10% of their potential producing capacity during the season of heaviest withdrawals, will produce its full market requirements? The additional 219 wells would involve an immediate expenditure of $25,000.00 each, a total of $5,475,000.00. What justification would there be in requiring Consolidated to drill a well on each 160 acres of its 10,273.53 acres, when it is producing its full market requirements from its 12 wells, produced at an average of less than 5% of their producing capacity? To do so would require the drilling of 52 additional wells, involving an immediate expenditure of $1,300,000.00. Under the necessary operation of the statute and orders, appellees would be required to make these unnecessary expenditures immediately, when in the due course of business they would be able to supply their

market requirements by drilling a few additional wells each year as the production from their present wells declines.

Appellants assert that it is only through the drilling and operation of wells that gas may be produced, and that the productivity of any tract or area may be determined. As a matter of fact, this whole case has proceeded upon the theory that the limits of the Panhandle gas field have been definitely fixed and are now well known, and that the underground geological conditions obtaining throughout the field are sufficiently known to enable experts to make estimates of the total original reserves of gas and the total present reserves of gas. We have already pointed out that the witnesses Hughes, Peterson and Camp testified to estimates of these reserves, including the reserves now owned by each of the appellees. Appellants did not by any testimony introduced contest or question these estimates. 3,000 wells have been drilled in this reservoir (R. 169). Under the physical conditions and in the light of the present state of development in the Panhandle field, it is now possible, with a fair degree of accuracy, to determine approximately the amount of gas underlying the reserves of appellees respectively and of each other owner of lands or leases within the reservoir. That the reserves can be determined was judicially recognized by the Supreme Court of Texas in *Brown* v. *Humble Oil & Ref. Co., supra,* in which the court said:

> "It is now, however, recognized that when an oil field has been fairly tested and developed, experts can determine approximately the amount of oil and gas in place in a common pool, and can also equitably determine the amount of oil and gas recoverable by the owner of each tract of land under certain operating conditions."

That the ascertainment of the extent of each owner's reserves will involve difficulties for the administrative body

does not excuse the Legislature or the Commission for failure to require that such reserves be ascertained to the end that each owner be protected in his right to recover from the common pool a quantity substantially in accord with the quantity owned in place.

In *Brown* v. *Humble Oil & Ref. Co., supra,* the Supreme Court said:

> "It is the duty of the Commission to adjust the allowable based on the potential production so as to give to the owner of such smaller tract only his just proportion of the oil and gas. By this method each person will be entitled to recover a quantity of oil and gas substantially equivalent in amount to the oil and gas under his land."

We find a very remarkable observation by appellants on page 240 of their brief, in which they say, "Fixing an allowable for an owner of an undrilled lease would be simply a gesture, because without a well he could not produce his gas." It is true that without a well the owner of an undrilled lease could not produce his gas. Appellants, therefore, would allow those who have wells to take such owner's gas because that owner, for lack of inclination, initiative or financial means, fails to drill a well on his lease. They take it for granted there is nothing that can be done for him because he has not provided himself, through the drilling of a well, with the means with which to produce his gas. Yet appellants are horrified because appellees and other pipe lines will not furnish a market for another group of owners, whom the trial court in its opinion described as "those in whose interest, under the notion of correlative rights, the orders seek to administer the act (R. 159)," who have drilled wells but who have failed to provide themselves with market and transportation facilities. Under the contention of appellants, why couldn't, and why wouldn't, the Legislature and the Com-

mission provide that those who have wells be required, as a condition for producing gas from their wells, to drill wells for those who have not drilled them? That this would be unjust, appellees readily agree; but it would be no more unjust than the present statute and orders, which require appellees to furnish markets for the favored group of owners, before appellees and the other pipe lines can produce and market their own gas by transporting it through the pipe lines to distant market outlets.

Appellants assert that the statute adjusts only the rights of producers. As a matter of fact, it adjusts the rights of nobody. It takes from that group of owners to which appellees belong property and rights in property, and confers same on a second group of owners who have wells, from which many of them have already produced exorbitant quantities of gas, and leaves absolutely without protection a third group of owners who have neither wells, pipe lines nor markets. It also leaves appellees and those similarly situated without any protection for their undeveloped gas reserves. In fixing the allowable from Texoma's wells, the orders take into consideration only a maximum of 640 acres for each well, or 57,600 acres for the 90 wells already drilled. In fixing the allowables for Consolidated, they take into account only 1473 acres, the aggregate of the tracts on which its 12 wells are located. If the orders were not subject to the objections we will hereinafter mention, the whole scheme of so-called proration would be fatally defective, unreasonable and arbitrary because of the circumstance alone that Texoma owns, in addition to the leases taken into account, 140,600 acres of proven gas reserves, and Consolidated owns, in addition to the leases taken into account, 8,800 acres of proven gas reserves. What possibility is there, under the operation of the statute and orders, for Texoma and Consolidated, and

others similarly situated, to produce a quantity of gas substantially equivalent in amount to the recoverable gas underlying their land, as the Supreme Court of Texas, in the case of *Brown* v. *Humble Oil & Ref. Co., supra,* so recently held they have a right to do? It appears conclusively, therefore, that in addition to the instances already pointed out, the operation of the statute and orders, in taking no account of and in making no provision for the fact that appellees and others similarly situated own extensive undeveloped reserves, would be to take from appellees and others similarly situated enormous quantities of gas, without due process and without compensation, for a purported public, but in fact private use, and to deny appellees equal protection of the law in their ownership of such undeveloped reserves, and said statute and orders are therefore arbitrary, unreasonable and void because of the constitutional provisions pleaded by appellees.

14. TEXOMA IS NOT ESTOPPED TO ATTACK THE STATUTE AND ORDERS HERE ATTACKED BECAUSE IT ADVOCATED BEFORE THE LEGISLATURE THE ENACTMENT OF A MEASURE PROHIBITING THE WASTAGE OF GAS.

It is true that appellee Texoma contributed to the activities of the Panhandle Conservation Association, which attempted to arouse public sentiment against the terrible wastage that was occurring in the Texas Panhandle as the result of the stripping law, commonly referred to as the Sour Gas Law. The Secretary of that organization testified that the purpose of the Association was to educate the people of Texas, and the Panhandle in particular, about the dissipation of the oil and gas field that was taking place principally by stripping operations (R. 363); that J. G. Dickinson was a director of the organization and that at that time he was, and still is, Superintendent of Production of Texoma (R. 364); that the principal object was to

create public sentiment to cause a repeal of the law which permitted the extraction of gasoline and the popping of the residue gas into the air (R. 364); that the pipe lines were concerned because of their heavy investments, like some of the other members of the Association (R. 365); that advertisements were inserted in various Panhandle newspapers; that others were broadcast by radio; that circulars and illustrations were mailed to newspapers out over the State, to members of the Legislature and other public officials; that attempts were made to get various organizations of the Panhandle to pass resolutions petitioning the Legislature to remedy the wasteful conditions; that the Association caused advertisements to appear on approximately fifty billboards, and induced a number of members of the Texas Legislature to visit the Panhandle field and see for themselves the wastage that was going on (R. 367-368); that the Association did not sponsor any particular legislative program (R. 373). One of the attorneys for Texoma caused House Bill 151 (R. 381-384) to be introduced in the Legislature and appeared and urged the adoption of that bill (R. 373). It will be noted that this bill contained none of the provisions here under attack. It was stipulated that House Bill 151 was drafted in the form in which it appears in the record (R. 423). While House Bill 266, which was finally enacted, embraced the provisions of House Bill 151 prohibiting wastage and restricting the manufacture of carbon black to sour gas, appellants do not even claim that Texoma advocated those provisions, which they erroneously term "ratable production" provisions, which are the provisions here under attack. Can it be said that Texoma, confronted as it was with a situation which threatened the utter destruction of its investments, aggregating more than $72,000,000.00, could not participate in activities directing the attention of the public to the tremendous threat involved in the

wholesale wastage of natural gas in the Panhandle, and could not petition the Legislature to prohibit this wastage, to the end that Texoma's gas reserves and its other investments be not destroyed, without estopping itself from attacking some other enactment of the Legislature that violated Texoma's constitutional rights? Can Texoma be made to pay for the protection of its property against wanton destruction by a surrender of its constitutional rights in its property? What advantage does Texoma, as a private owner of gas, of pipe lines and of markets, get from legislation protecting its rights in these properties, if the Legislature can demand as a price for such protective legislation that it submit to the terms of other legislation which takes from it this same property, or a substantial interest therein, without due process of law and without compensation? The principles announced in the cases cited by appellants have no application. Of course, Texoma would not be permitted to go to the Texas Legislature with a specific statute and ask the Legislature to enact it, and then when the Legislature enacted that statute, go to the courts and attack it as being unconstitutional. Neither could Texoma go to the Railroad Commission and ask the promulgation of a particular order under the authority of a statute, and, upon procuring that order, or some other order on the authority of that statute, be heard to say in the courts that the statute did not authorize the promulgation of the order. In going to the Legislature and asking for legislation to prohibit waste, Texoma conceded the authority of the Legislature to enact a statute prohibiting the waste of natural gas; but such concession could in no sense be construed as a concession that the Legislature had the right, because it had enacted the legislation prohibiting waste, to require Texoma to submit to a tremendous drainage of gas from its reserves and to a division of its pipe line facilities and its private marketing contracts. If it go to the Railroad

Commission and ask for the promulgation of a particular order under a statute pointed out by it to the Commission, it concedes the power of the Commission under the statute to issue the order. The authority to say "yes" implies the authority to say "no" and if the Commission refused to issue the order requested, but issued another order in pursuance of the powers conferred by the statute invoked, then Texoma would be estopped to deny the authority of the Commission under the statute to issue the order finally promulgated.

House Bill 266 embraces a number of subjects and is easily divided into sections dealing with wholly different matters. That part of the statute requested and supported by Texoma had to do with prohibiting the wastage of gas, the classification of gas, and the prohibiting of certain inferior uses of sweet gas; but at no stage of the proceeding did Texoma concede the power and authority of the Legislature under the Constitution to enact any such statute as that attacked in this proceeding. The Legislature was not misled, nor did Texoma gain any advantage by any representation made by Texoma or its representatives which could be construed as a concession that the Legislature had the authority to enact those provisions of House Bill 266 which Texoma attacks in this case.

15. EVEN IF THE STATUTE WERE VALID, THE ORDERS ATTACKED ARE INVALID IN THAT:

(A) THE DRAINAGE AREAS FIXED BY THE COMMISSION ARE ARBITRARY AND UNREASONABLE;

(B) THE PRORATION FORMULA ALLOCATING 50 PER CENT OF THE ALLOWABLE TO PRODUCTIVE CAPACITY AND ONLY 50 PER CENT OF THE ALLOWABLE TO THE ARBITRARY ACREAGE ASSIGNED BY THE COMMISSION IS ARBITRARY AND UNREASONABLE.

Without waiving any other attack directed at the statute and orders, appellees submit that, for the additional reasons stated in the caption, the orders are in any event unreasonable and arbitrary as applied to appellees and those similarly situated in that they operate, as we shall show, to take large quantities of gas which appellees and those similarly situated would be able to produce from their wells without waste, which gas will be drained away to low pressure areas and produced by the owners of other wells, and in that appellees and others similarly situated are denied the equal protection of the law entitling them to produce and market their gas from such wells to the extent that they are able to develop market outlets. In its opinion (R. 149-150) the trial court very aptly stated the contentions and facts pertinent to these points as follows:

> "In subordination to this general complaint, and only in the event it be not sustained, plaintiffs (appellees) complain of the order in the particulars to which it has descended in providing the proration scheme, as not in accordance with the statute it purports to rest on, and also as violative of the constitutional provisions already invoked. The particulars of which they complain are that in the purported effort to comply with the legislative direction for fixing the daily allowable for each gas well in the common reservoir, the respondents have departed from it, and have unjustly, unfairly and unreasonably fixed the allowables. They have fixed them by arbitrarily dis-

regarding factors the statute fixed as controlling and arbitrarily selecting a standard or basis having no relation either to the legislative directions or to the physical situation. Instead of taking into account, as the statute requires, the size of the tract, its producing capacity, and the actual drainage area of each well, the Commission has arbitrarily fixed the drainage area of each well in the Eastern Panhandle field at 160 acres, in the Western Panhandle field at 640 acres, and has fixed the allowable of each well by an arbitrary formula allowing 50 per cent based on the potential of the wells, and 50 per cent based not on the real drainage area, but on the acreage the Commission has arbitrarily assigned to each well. (2) It has made this more arbitrary by extending this formula of acreage influence to tracts very much smaller in size, thus allowing tracts held in smaller acreage ownership a greatly larger proportionate production than tracts like complainants', held in large ownership."

(A) THE DRAINAGE AREAS FIXED BY THE COMMISSION ARE ARBITRARY AND UNREASONABLE.

House Bill 266, enacted by the Forty-fourth Legislature, is the basis for the orders of the Commission. Section 13 provides that:

"In determining the daily allowable production for each gas well, the Commission shall take into account the size of the tract, segregated with respect to surface position and common ownership upon which such gas well or wells are located; the relation between the daily producing capacity of each gas well and the aggregate daily capacity, of all gas wells producing the same kind of gas in the same common reservoir or zone; and all other factors which are pertinent; provided, that the Commission shall not take into account the size of the tract upon which any gas well or wells are located, in excess of the efficient drainage area of such well or wells producing at 25 per cent of the daily productive capacity; which drainage area shall be determined by the Commission. In ascertaining the drainage area of a well, the Commission shall

take into account such factors as are reflected in the productive capacity of a gas well, including formation pressure, the permeability and porosity of the producing formation, and the well bore's structural position, together with all other factors taken into account by a reasonably prudent operator in determining the drainage area for a gas well."

It will be noted that the Legislature has provided that the Commission must take into account the many factors enumerated in determining the drainage area of a well. It follows, without argument, that the Legislature concluded that all of these factors were important and should be given their due consideration. Certainly the well's position upon the structure does have a most important bearing upon the question. Surely a well with high rock pressure should be permitted to produce more gas than a well with a low rock pressure, if migration of gas in the structure is to be avoided. Certainly a well in an area where the wells generally are widely spaced has a greater drainage area than a well in an area where the wells generally are closely spaced. This is true because the production of neighboring wells will counteract the production from the well in question, and thus limit, to this extent at least, the area from which any given well will produce the gas. For example, if wells were evenly spaced over the entire field with a well to every 10,000 acres, then the drainage area of each well would be 10,000 acres, because the gas would migrate the entire distance. (One well will drain the entire reservoir of more than 1,000,000 acres. R. 28-281. This is admitted by appellants. Appellants' Brief, 217-218.) If the spacing is one well to each 1,000 acres and the wells are produced uniformly, then the drainage area in any event could not exceed 1,000 acres, because of the counteracting influences of each well upon the other. Likewise, if the spacing of the wells is one well to each 160 acres, and they are produced uniformly,

then the drainage area could not exceed 160 acres, for the same reason. The Legislature evidently had all of these factors in mind when House Bill 266 was enacted. The Legislature also had in mind that each well in the field might have, and probably would have, a different drainage area, due to the influences of other wells and due to the well's position upon the structure, and due to all of the other factors set out in the Bill.

It was quite logical, therefore, for the Legislature expressly to enjoin upon the Commission the absolute duty to fix the drainage area of "*each gas well*". As a matter of fact, the allocation of production to each well in the field could not be accomplished equitably without taking all of such factors into consideration, and without taking into account the size of the tract upon which each producing well is located.

A very casual examination of the Commission's order will indicate that the Commission has not allocated production to *each well* upon the basis set out in the Act, but has made its allocation upon an arbitrary "rule of thumb". It will be noted from an examination of the order that as to the West Panhandle field the Commission has found that 640 acres is the efficient drainage area of every well in the field. It has wholly disregarded the spacing of wells as the same exist at this time. It has wholly disregarded the structural formation from which each well is producing. It has given no consideration whatsoever to formation pressure (rock pressure). It has given no consideration to porosity of the producing formation. It has given no consideration to the permeability of the producing formation. It has given no consideration whatsoever to the size of the tract upon which the well is located, where such tracts exceed 640 acres.

The evidence shows beyond any question that the factors set out in the Act of the Legislature as a guide to the

Commission in determining the drainage area of a well are not similar throughout the field. The testimony shows high pressure areas and low pressure areas. It shows wells high on the structure and low on the structure. It shows areas in the field where the wells are closely spaced and other areas where they are widely spaced. It shows areas that have virtually been depleted and other areas which have a virgin rock pressure at this time. It shows different characteristics as to porosity and permeability in the producing formations.

The Commission has disregarded all of these factors and has found, notwithstanding variations in the particulars above enumerated, that every well in the West Panhandle field has a drainage area of 640 acres and every well in East Panhandle field has a drainage area of 160 acres. This finding is entirely arbitrary and capricious. It is not based upon a consideration of each of the factors which the Legislature has said the Commission must consider. The Commission has not fixed, and has not attempted to fix, the drainage area of "each well"; but, on the contrary, has fixed the drainage area of "all wells", and has applied the same yardstick to all wells, notwithstanding a great dissimilarity existing throughout the field with reference to the factors that must be taken into account. (Exhibits 3 and 16, R. 439-475, and Exhibit 24, R. 500-507.)

A reference to Exhibits 3, 16 and 24 will disclose that there are many thousands of acres in the West Panhandle field held by wells located upon tracts in excess of 640 acres. Every tract in the West Panhandle field containing more than 640 acres is entitled to its full complement of acreage, provided that the well or wells located upon each of such tracts are capable of producing efficiently all of the gas underlying such tracts. The Commission has failed absolutely to take such facts and circumstances into

consideration. It has made no effort to determine, as disclosed by the order upon its face, the efficient drainage area of each well separately, but has merely established an arbitrary rule to the effect that every well in the field has a drainage area of 640 acres.

The effect of the Commission's order is to allocate production in the West Panhandle sweet gas area to only 164,166 acres, while the testimony in this case shows that the total free sweet gas area in the West Panhandle field capable of production is 723,000 acres. Less than 25 per cent, therefore, of the proven sweet gas acreage in the West Panhandle field is allocated production, while more than 75 per cent is entitled to no production whatsoever under the Commission's orders.

The testimony also discloses that in the West Panhandle sweet gas producing area 523,063.97 acres of proven sweet gas lands are held by producing wells. (R. 177.) This is acreage that has been drilled and upon which delay rentals are not now being paid. The only revenue to be derived from this acreage is through production. The Commission's orders arbitrarily and without basis in fact allocate production to only 164,000 acres. Therefore, less than one-third of the producing sweet gas acreage in the West Panhandle field secures any allocation of production whatsoever. This results by virtue of the fact that the Commission will not consider more than 640 acres as being held by one well, notwithstanding the fact that the well holds a much larger acreage than this, and notwithstanding the fact that the undisputed testimony as shown by the history of wells that have produced large volumes of gas is that one well will drain a much larger area than 640 acres.

The total proven sweet gas lands in the East Panhandle area aggregate 270,000 acres, while the Commission has

allocated production only to approximately 20 per cent of the total area (R. 247).

The additional acreage which is held by producing wells could be given its equitable proportion of the total production by enlarging the acreage factor. If a well is located upon a 5,000 acre tract, or a 10,000 acre tract, and is capable of producing the gas at this time that such tract is equitably entitled to produce, then the Commission under the law is required to consider every producing acre in such tract, and is not permitted under the law to limit its acreage consideration to 640 acres only. The statute clearly contemplates a maximum production of 25 per cent of the open flow capacity of a well if it is necessary to do so in order to permit such well to receive its full complement of acreage. An inspection of the Commission's orders, however, will disclose that the sweet gas wells in the West Panhandle field are permitted to produce an average of approximately 7 per cent of their open flow capacity (R. 498).

The record in this case also clearly shows that one well will produce gas from an area much larger than 640 acres. This is demonstrated by the actual producing history of many wells in the Panhandle field. The producing history of every well in the field is shown in Exhibits 3, 16 and 24 (R. 439-475).

Let us take, for example, Canadian River Well No. D-4 Masterson located in Section 108, Block O-18, Potter County, Texas (Exhibit 3, R. 451). This is one of the first gas wells drilled in the field, and has been producing gas in large quantities for approximately seventeen years. This well has produced through July 31, 1935, a total of 19,126,118,000 cubic feet of gas. It is located upon a lease that contains 5,457.18 acres. The production per acre aggregates 3,505,000 cubic feet. The rock pressure of this

well, as shown by Exhibit 3, is 415 pounds per square inch. This well, therefore, has to July 31, 1935, produced approximately 30,000,000 cubic feet per acre based upon a 640 acre unit. The testimony reflects that the average for the West Panhandle field is approximately 15,000,000,000 cubic feet per acre; however, the testimony also shows that areas in the field will of course produce much more than this. Let us assume that the area in which the Masterson well is located will produce 30,000,000 cubic feet per acre. This well has declined only 15 pounds in rock pressure, which shows a decline of only approximately 3½ per cent. This well, therefore, has produced only approximately 3½ per cent of the gas in place within its drainage area.

If we assume, therefore, that the acreage content of gas in this area is 30,000,000 cubic feet per acre, which is the highest estimate given by any witness, and then consider the fact that it has produced only 3½ per cent of the gas in place, we find that this well has a drainage area of approximately 19,000 acres as compared to the 640 acres allocated to it by the Commission.

This well has produced this large amount of gas without any injury whatsoever so far as the well is concerned or so far as the producing formations are concerned. It has not created a low pressure area, as shown by the fact that its rock pressure is still 415 pounds as against an original rock pressure of 430 pounds. Yet, in the face of such facts, the Railroad Commission of Texas has solemnly declared that this well will not drain more than 640 acres when operated at 25 per cent of its capacity. The result of such finding and the orders based upon such finding has the effect very seriously to prejudice both the well owner and the royalty owners insofar as this lease is concerned. This is also true of every lease owner and every royalty owner in the field where one well holds more than 640 acres in

the West field or more than 160 acres in the East field. If this well has a drainage area of 19,000 acres (and its history shows that it does), then by what authority does the Commission arbitrarily allocate to it only 640 acres when it is actually located upon a lease containing 5,457.18 acres? Are not the royalty owners and the lease owners entitled to have the entire acre in the lease considered? We submit that the failure of the Railroad Commission to recognize the full acreage on this well and other wells similarly situated amounts to the taking of property without due process and without compensation, and to a denial of equal protection, in violation of the State and Federal Constitutions.

The appellants argue that the owner of this lease may secure the full complement of acreage by drilling additional wells. In this case it would take eight additional wells and many miles of additional gathering lines, all of which would result in a large expenditure of money. The evidence conclusively indicates that this one well is sufficient adequately and efficiently to produce all of the gas contained in this lease operated at much less than 25 per cent of its capacity. This being true, the order of the Commission that would require it to drill eight additional wells and lay many miles of additional gathering lines, in order to get its just proportion of the gas, all of which is wholly unnecessary and would serve no useful purpose whatever, would amount to the taking of property without due process and without compensation, and to a denial of equal protection.

The Masterson well hereinabove discussed is located at a point far removed from the low pressure areas along the northeast flank of the structure. The reduction in rock pressure in this well has not yet reflected to any extent the large production in the oil fields, or the operations of the stripping plants. It is a good example of the drainage area of a well not yet influenced by these other factors. Every

pound of the decline in the rock pressure in this well can be attributed to the production of gas for a light and fuel market. This is also demonstrated by the various maps introduced in this case showing the locations of wells in the field. For convenience of the Court in consulting the maps we will state that this well is located in north central Potter County approximately 4¼ miles south of the Moore-Potter County boundary line.

We have selected three additional wells as examples of the area that one well will drain. Two of these wells are the Bivins A-3 well located in Section 30, Block M-20, Potter County, and the Masterson A-2 well located in Section 49, Block 3, G. & M. Survey, Moore County. Both of these wells are located in an area which probably has suffered drainage from the dissipation of gas in the oil fields and from the operation of stripping plants in southwestern Hutchinson County.

The Bivins A-3 well is an average sized well, its open flow being about the average of the field as a whole. This well to July 31, 1935, had produced 9,193,447,000 cubic feet of gas. (Exhibit 3, R. 451). The acreage held by this well at this time aggregated 19,189.26 acres. It had, therefore, produced 479,000 cubic feet per acre—far less than the average for the field as a whole. The rock pressure of this well is 402 pounds, a decline of 28 pounds, being a decline of something less than 7 per cent. It would follow from this, therefore, that this well has produced less than 7 per cent of the gas in its drainage area. Computing this on a 30,000,000 acre content, it is shown that this well is withdrawing gas from an area of 4350 acres, and if computed upon a 15,000,000 acre content, it is shown that this well has withdrawn gas from an area containing 8700 acres. This is an average sized well and, therefore, the average acre content of 15,000,000 cubic feet per acre for the field would be about the correct basis of computation.

The Masterson A-2 well hereinabove referred to has produced 14,956,251,000 cubic feet to July 31, 1935. This well holds 14,740.35 acres. It has produced to that date 1,015,000 cubic feet per acre, which is far less than the field average. (Exhibit 3, R. 450). It had a rock pressure at that time of 396 pounds, which represents a decline of approximately 8 per cent, and which proves that it has produced approximately 8 per cent of the gas contained in its drainage area. Assume, therefore, a 30,000,000 per acre content originally, this well has produced gas at this time from an area of 6230 acres, and if we assume an acre content of 15,000,000 originally, then it has produced from an area of 12,460 acres.

None of the wells hereinabove discussed have been injured in any manner by the quantity of gas produced. None of them have created low pressure areas. It is conceivable that the Masterson A-2 and the Bivins A-3 wells hereinabove discussed have lost some gas by drainage to the low pressure area immediately to the east of these wells. If we should give any consideration to this fact, then the drainage area of each of these wells would be proportionately greater.

We desire also to call the Court's attention to the fact that the pressure of each of these wells, as stated herein, is determined by tests made at the well, and represents the pressure obtaining at the well, which would be the lowest pressure at any point in the entire drainage area. In other words, when a million cubic feet of gas is produced from any given well, the pressure momentarily drops at the point of production, and a few feet away the pressure would still be practically virgin. Therefore, when we consider the large volumes of gas that have been produced from each of these wells, and consider that we have used the pressures obtaining at the well, it can very readily be seen that the reservoir pressure would become greater and greater as

we get farther and farther from the well until it would finally reach a point where the pressure would be absolutely virgin. Our calculations, however, have been based upon the assumption, which is more favorable to appellants than the facts justify, that the pressures were the same over the entire drainage area.

Since the drainage area of the Masterson D-4 well is 19,000 acres as a minimum, and the drainage area of the Bivins A-3 well is perhaps 8700 acres as a minimum, and the drainage area of the Masterson A-2 well is 6230 acres as a minimum, the Commission's orders which assign only 640 acres to each of these wells constitute confiscation of property in violation of the State and Federal Constitutions. The orders, therefore, as applied to these wells, are arbitrary and unreasonable. The application of the orders to these wells is intended to be illustrative only and indicates clearly the effect of the orders on all other wells on large tracts owned by these appellees and others similarly situated. It was necessary, however, in order to illustrate this point adequately, to consider wells located on large tracts and which had produced large volumes of gas, and which were unaffected by the heavy withdrawals of gas in the oil field and stripping areas.

The evidence to the effect that one well, if given time, will drain the entire field is uncontradicted (R. 208). The appellants, however, take the position that although this is true, this fact should be ignored because it would perhaps take geological ages for this result to be accomplished through the operation of a single well; that the field will not be produced and is not being produced by means of one well, and that, therefore, this fact has no practical relevancy. Appellees submit that the time element has nothing whatsoever to do with the question under discussion. One well will drain the entire field. The question as to the rapidity with which the gas will be withdrawn depends en-

tirely upon the market outlets. This is an operating question. If an operator has but one well and this well is unable to deliver the required volume of gas for his market outlets, then obviously he will drill one or more additional wells, until the aggregate delivery capacity is sufficient to meet his requirements. The Commission is not called upon to determine this operating question. It is only required to determine the area that one well will efficiently drain when operating at 25 per cent of its capacity. The drilling of wells simply provides more conduits for the escape of gas from the producing formations to the surface of the earth. It does not increase in any manner the proportionate ownership of gas in place. So long as an operator is able to produce the necessary gas to meet his market outlets from one well, and at the same time not produce more from the common reservoir than is his just due, he should not be required to drill additional wells at the whim and caprice of the Commission, so long as his operations are not causing waste.

Appellants argue, also, that in other fields acreage units of less than 640 acres per well have been upheld. This fact has no relevancy whatsoever. The extent of the drainage area of a well is absolutely a question of fact to be determined from all of the circumstances obtaining in any given field with respect to any given well in that field. This record reflects that the Panhandle gas field is the largest in the world. It is approximately 125 miles in length and varies in width from 10 to 30 miles. The average well in this field has a capacity to deliver in excess of twenty million cubic feet per day. Wells in gas fields generally do not have the ability to produce this volume of gas. This is a positive indication of great porosity and high permeability. It is also a positive indication (which supported by uncontradicted evidence) that gas in the Panhandle field will migrate for long distances—many miles. This is,

not true in all gas fields. It may be entirely possible, therefore, that a 160 acre unit, or a smaller unit, might be a reasonable drainage area in other fields, and yet be most unreasonable as applied to the Panhandle field. Situations in other fields may be, and are, greatly different from conditions existing in the Panhandle field. The Panhandle field, and particularly the West Panhandle field, is located in an area where leases generally are large, where the wells are widely spaced, and where the wells on the average are capable of producing unusually large volumes of gas. All of these matters have a most direct bearing upon the determination of a reasonable drainage area. The conditions hereinabove enumerated do not exist generally in other gas fields in this country. In most other fields wells are much more closely spaced than is necessary in the Panhandle field. Wells in most other fields do not have the producing capacity of the wells in the Panhandle field. The producing formations in most other fields have different characteristics as to porosity and permeability. We submit, therefore, that whatever the rules might be in the fields referred to by appellants, the record shows that such rules would be arbitrary and unreasonable in the Panhandle field.

The appellants cite, as an example, the oil proration orders applicable to the East Texas oil field, where the spacing rule prevailing provides for one well to each 10 acres. Appellants' argument in this respect clearly indicates that the East Texas field has been completely developed, for all practical purposes, from the standpoint of oil production. The East Texas field at this time contains more than one well for each 10 acres in the field. It is not inequitable, perhaps, under such circumstances to allocate production to potential producing capacity alone, assuming that producing formations are similar. If the Panhandle gas field were developed at this time to the extent of one well upon each 640 acres in the field, then there could be

no serious objection to prorating gas production upon the basis of the potential open flow of each well. This situation, however, does not obtain in the Panhandle field. The size of the tracts upon which wells are located is from 10 acres upwards. Some of the wells are located on tracts as large as 15,000 acres.

Appellants also contend that the acreage unit applied in the West Panhandle field follows closely the drilling pattern already set by operators in that field. This is true only when certain isolated areas are considered. It is not true where the field as a whole is considered. An inspection of Exhibit 3 (R. 439) and Exhibit 16 (R. 459) will disclose that in the sweet gas area of the West Panhandle field there are 473 gas wells, and that the total acreage held, in the aggregate, by production from these wells is 553,159 acres, or an average of 1169 acres to each well. The average in Potter County is more than 4800 acres per well. The average in Moore County is more than 1400 acres per well. The average in Carson County is slightly more than 900 acres per well. The average in Hartley County is slightly more than 19,000 acres per well. It is only in Gray and Hutchinson Counties in the entire West Panhandle field that the average is less than 640 acres per well. This is due entirely to the fact that both Hutchinson County and Gray County are heavy oil producing counties. Many of the wells now classified as gas wells in these counties are depleted oil wells, which have been plugged back and conditioned as gas producers, and many wells that were originally completed as gas wells were drilled in the hope of discovering oil. Where wells have been drilled for gas production only the spacing over the entire area has been much greater than one well to 640 acres.

(B) THE PRORATION FORMULA ALLOCATING 50 PER CENT OF THE ALLOWABLE TO PRODUCTIVE CAPACITY AND ONLY 50 PER CENT OF THE ALLOWABLE TO THE ARBITRARY ACREAGE ASSIGNED BY THE COMMISSION IS ARBITRARY AND UNREASONABLE.

The orders divide the market demand, as the Commission determines it to be, into two equal parts. One-half of the market demand is allocated to the various wells in the field upon the open flow capacity of such wells, without taking into account any other factor. The remaining portion of the market demand is allocated to all of the wells in the field upon an acreage basis, but does not allow more than 640 acres to any one well in the West Panhandle field, and 160 acres to any one well in the East Panhandle field, regardless of the fact that many wells hold by production a much larger acreage than this.

The open flow of each well may be some indication of the volume of gas in place, but an arbitrary allocation of 50 per cent of the total production of the field to the open flow of the wells alone is so unjust, arbitrary and unreasonable as to be absolutely void. The Legislature never intended for the Commission to make any such allocation. A reading of House Bill 266 will disclose, we believe, beyond question that the Legislature intended for production to be allocated basically upon acreage, rather than upon open flow. It charged the Commission with the duty of considering acreage, position upon the structure, rock pressure, porosity and permeability. All of these factors are considered in estimating the volume of gas in place. In other words, each has a bearing upon the determination of the volume of gas under a particular tract. The Legislature clearly had in mind that the proration of gas should be made, primarily, upon this basis. The Commission, however, has entirely repudiated the terms and spirit of the Act upon which its order is based, and has made an arbi-

trary allowance of 50 per cent to open flow, which, at the best, is entitled to very little weight. It gives as much weight to the open flow of a well on a 10 acre tract as it gives to the open flow of a well on a 10,000 acre tract, and if each well is the same size each is entitled to the same proportion of that one-half of the market demand that is prorated on open flow alone. If the gas is to be prorated from the standpoint of ownership in place, which the Act clearly contemplates, then certainly the Commission has gone far afield.

The formula prescribed by the Commission for the allocation of production in the sweet gas area of the West Panhandle field is contained in Exhibit 82 (R. 560). A mathematical application of this formula clearly indicates that it is most unjust and, in fact, is arbitrary. If we assume a 25,000,000 cubic foot well on a 160 acre tract and a 25,000,000 cubic foot well on a 640 acre tract, certainly it should also be assumed that the volume of gas per acre in place under each tract is the same because the wells are of the same size. This is appellants' theory. Therefore, the owner of the 640 acre tract should receive just four times as great an allocation as the owner of the 160 acre tract. This, however, is not the result, but on the contrary, the owner of the 160 acre tract would be able to produce 57.9 per cent as much gas as the owner of the 640 acre tract. The owner of the 160 acre tract, equitably, is entitled, under appellants' theory of correlative rights, to only 25 per cent as much production as the owner of the 640 acre tract. Therefore, the owner of the small tract is entitled, under the order, to produce more than 100 per cent more gas than he is equitably entitled to produce. Under such correlative rights theory, if these tracts are adjoining, then the application of any such formula must inevitably result in the owner of the small tract producing a large percentage of the gas originally owned in place by

the owner of the larger tract. Appellants say this is just and that it is equitable, but they do not stop here. They have the audacity to say, in effect, not only that the State should hold the hands of the owner of the large tract, so as to permit the owner of the small tract to produce much of his gas, but that it is also fair, equitable and reasonable to compel the owner of the large tract, if he also owns a pipe line, to purchase and pay for his own gas, produced through the well of his neighbor. That this is the position of appellants cannot be denied. The actual physical facts prove it beyond any question.

Certainly, the orders of the Commission do not protect the right of a lease owner to produce the gas he owns in place at the rate he desires to produce it, so long as he does not commit waste.

Appellants say: "Quite so"; but add that the law under which the Commission is operating changes all of this. In effect they say that the Legislature has written a new law of property (they do not expressly admit this); and that owners of gas wells are no longer entitled to produce what they have always owned and had the right to produce; that the owners of gas wells must now restrict their production, even though they are not committing waste; that this radical change in property rights is based upon the application of the "correlative rights" theory.

The trial court has held, and we think correctly so, that the law in question empowers the Commission to restrict production only where it is necessary to prevent physical waste. But let us assume, for the sake of argument only, that under the law as construed by appellants, the Commission can restrict production if necessary to protect the correlative rights of all owners in a common pool. Just what do the appellants mean by the term "correlative rights"? Just what did the Legislature mean? You may

search the Act in vain for a definition of this term. Appellants say the formula is correct; therefore, they must say that the correlative rights of all the owners is to produce only the quantity allowed under this formula, which allocates 50 per cent to acreage and 50 per cent to open flow.

This definition clearly qualifies the law of capture. It changes the rule of correlative rights recognized at the time the statute was enacted. Neither does the Act, when considered together with the orders, permit each owner of gas to produce all of the gas that he owns, and no more or no less. The Act, when considered with the orders, does not prevent certain owners from producing far more gas than they own in place, but, on the contrary, actually sanctions such disproportionate production.

Let us again refer to the 50-50 formula as adopted by the Commission (R. 560). Assuming a well on each size tract of 25,000,000 cubic feet open flow capacity, the operation of this formula distributes the allowable as follows (see testimony of Carpenter, R. 250):

Acreage	Allowable Production per Day
2,560	2,099,000 cubic feet
1,280	2,099,000 " "
640	2,099,000 " "
160	1,209,000 " "
40	987,000 " "
10	931,000 " "

These calculations are based upon the order of December 11, 1935, which was the only order available at the time of the trial. However, the calculations would be practically identical if based upon either the January or February order.

It will be observed that the owner of a well on a 10 acre tract procures approximately 45 per cent as much production as would the owner of the same size well on a 640 acre tract, and likewise would procure 45 per cent as much pro-

duction as the owner of the same size well on a 1,280 acre tract or a 2,560 acre tract. Certainly it cannot be denied that if the ownership of gas in place is to be protected and the various owners in the field are to be entitled to produce from the common pool in the proportion that the total ownership of each bears to the whole, that the 50-50 formula of the Commission does not accomplish this result, and does not even approximate it. There is no reason why the owner of the 640 acre tract should not be permitted to produce just sixty-four times as much as the owner of the 10 acre tract; and, likewise, the owner of the 1,280 acre tract should be permitted to produce 128 times as much, and the owner of the 2,560 acre tract should be permitted to produce 256 times as much, yet in each instance the owners of the larger tracts are permitted to produce but a little more than twice as much as the owner of the smaller tract. A situation such as this must inevitably result in the owners of the large tracts losing much of their gas through drainage to the owners of the small tracts. Does this protect correlative rights?

This illustration is in no sense unreasonable, since the very things depicted above exist in the West Panhandle field as to the acreage of the Texoma, as well as to all other owners of large acreage in the field.

The appellants say this constitutes *ratable production;* that it constitutes *proportionate takings;* that it prevents unequal withdrawals. That the reverse is true is so obvious it requires no further comment.

Let us take still another example, based upon the February order, issued on January 18, 1936. The results would be almost identical if the computations were based upon the January order.

	Acreage Held by Production	Number of Wells	Allowable Production per Day
Hagy, Harrington & Marsh..	2,474	18	25,461,000 cu. ft.
Moore County	119,922.89	65	112,495,000 cu. ft.
Potter County	136,000	39	68,483,000 cu. ft.

The above tabulation is taken from the February order. The production acreage held by wells in Moore and Potter Counties is taken from Exhibits Nos. 3 and 16 (R. 439, 459).

The Court will note that the total acreage shown in the Commission's order does not aggregate the total acreage shown in the tabulation, but this is due to the fact that the Commission does not consider more than 640 acres to each well, regardless of the fact that a well may be located on a much larger tract. The acreage factor of 2,474 shown for Hagy, Harrington & Marsh is taken from the Commission's order. The Court will also note in this connection that none of these wells have been allocated as much as 640 acres, and since the Commission allows the full acreage factor when it is 640 acres, or less, it follows that the total acreage of Hagy, Harrington & Marsh as shown on the order is correct.

Hagy, Harrington & Marsh, the record discloses, are the principal owners of the Cargray stripping plant, and have been very active in their efforts to sustain the validity of the Commission's order, notwithstanding the fact that they were still operating their stripping plant and popping into the air approximately 260,000,000 cubic feet per day, when this case was tried.

Any order that seeks to protect the ownership of gas in place and that seeks to permit each owner of gas in place to produce his true and equitable proportion of the market demand for the field must allow practically as much production per acre from one owner as it does from another.

It will be observed that Hagy, Harrington & Marsh own slightly more than two per cent as much productive acreage as that held by all wells in Moore County. They are permitted, however, to produce, under the Commission's orders, 25,471,000 cubic feet per day, as against the combined

total production in Moore County of 112,495,000 cubic feet per day, or slightly more than 22 per cent of the total Moore County production. It is apparent, therefore, that these operators are permitted to produce at a rate eleven times as great, on the average, as the producers in Moore County are permitted. It is not surprising that some of those appearing on the side of appellants, but in actual representation of those whose wasteful use the law forbids, as the trial court observes in its opinion (R. 151), are quite anxious to sustain this formula.

The producers in Potter County have a total of 136,000 acres held by wells, and are permitted to produce 68,483,000 cubic feet per day, while Hagy, Harrington & Marsh, with a little less than 2 per cent as much acreage held by wells, are permitted to produce 25,471,000 cubic feet per day, or more than 36 per cent as much as all of the operators in Potter County are permitted to produce, or at a rate approximately twenty times as great.

These calculations are in no sense hypothetical, but are based upon the Commission's order and findings. Certainly this cannot be said to constitute ratable production, or proportionate production.

We desire to discuss still another example, based upon the Commission's order, with particular reference to the Hagy, Harrington & Marsh allowable, which will also illustrate that the 50-50 formula is unreasonable and arbitrary.

The Commission has, in effect, stated that a well to each 640 acres is the proper spacing for gas wells in the West Panhandle field. Upon this basis the 18 wells of Hagy, Harrington & Marsh might well have been drilled on 11,520 acres, thus allowing 640 acres to each well. The Commission would say that this was full and adequate development. Let us assume, therefore, a tract of this size with 18 wells located thereon, the producing ability of each of

these wells being identical in every respect with the producing ability of each of the Hagy, Harrington & Marsh wells. This tract of 11,520 acres would, under the Commission's February order, have a total aggregate allowable of 41,265,000 cubic feet per day, as against Hagy, Harrington & Marsh's allowable from the same number of wells and of the same size of 25,471,000 cubic feet per day. Hagy, Harrington & Marsh would have slightly less than 18 per cent of the total acreage, while they would be permitted to produce, under the Commission's order, in excess of 40 per cent of the total production from the two tracts.

There can be no valid reason given why the owners of one tract should be permitted to produce any more, proportionately, than the owners of the other. We have assumed for the purpose of the illustration that the open flow of the wells was identical. Therefore it cannot be said that one tract was any more productive than the other. This being true, the owner of the 11,520 acre tract owned almost five times as much gas in place as the owners of the 2,474 acre tract, but was permitted to produce but little more than 50 per cent more gas. Any order that is based, primarily, upon the theory of "correlative rights" and permits such a situation as this to result is certainly not a reasonable order, but, on the contrary, is most unreasonable and arbitrary.

The foregoing illustration is most convincing that an arbitrary allocation of 50 per cent of the market demand to open flow alone is unreasonable. Such an allocation gives an unjust advantage to the owners of small tracts; it encourages drilling additional wells, and destroys much of the value of large leases. Hagy, Harrington & Marsh have the right under the law and under the orders to drill 18 additional wells on their 2,474 acre tract, and by so doing secure an allocation of almost 50,000,000 cubic feet per day, instead of the 25,000,000 allocation which they

now have. What is the advantage, therefore, of acquiring and developing additional acreage? Why would it not be more economical to acquire small tracts and develop them intensively? It does not take any more money to drill a well on a small tract than it does on a large one, and besides there would be a great saving in gathering lines, and there would be no additional cost whatsoever for additional acreage. It would render large tracts of gas-producing lands almost worthless.

There is no order, so far as we know, pertaining to the Panhandle gas field that restricts drilling. An operator may drill as many wells as he pleases upon any given tract. There is a practice in the Panhandle, however, to drill one oil well to each 10 acres. We shall assume, therefore, for the sake of argument, that it would be impossible to drill more than one gas well to each 10 acres. Certainly any operator can space his wells this close if he desires to do so. In fact, this record shows that some operators have already done this very thing. There will be still more examples of this kind when many depleted oil wells drilled on this basis are plugged back and conditioned as gas wells.

Original Exhibit No. 27-A is a graph prepared by the witness Carpenter, showing the flagrantly disproportionate allowables under this formula (see also Carpenter's testimony, R. 250). From this it appears that the daily allowable per acre to a well with a potential of 25,000,000 cubic feet located on a 640 acre tract is 3280 cubic feet. If the same size well be located on a 320 acre tract, the daily allowable per acre is 4700 cubic feet; if on a 160 acre tract, the daily allowable per acre is 5,550 cubic feet; if on an 80 acre tract, the daily allowable per acre is 13,230 cubic feet; if on a 40 acre tract the daily allowable per acre is 24,630 cubic feet; if on a 20 acre tract, the daily allowable per acre is 47,300 cubic feet; and if on a 10 acre tract, the daily allowable per acre is 93,100 cubic feet. Thus it appears

that this formula allows the owner of a well located on a 10 acre tract to produce from each acre of his lease more than 28 times as rapidly as the owner of a well on a 640 acre tract.

Carpenter's testimony shows that a gas well on a 10 acre tract, with a potential of 25,000,000 cubic feet daily, has an allowable of 931,000 cubic feet per day under the Commission's orders (this same result is also obtained by the application of the Commission's formula, R. 560); 64 such wells all located upon one section of land would have a total allowable of 59,584,000 cubic feet per day. Eleven such sections of land would have an allowable sufficient to produce the entire market requirements of sweet gas in the West Panhandle field at this time. In fact, about eight such sections would supply the combined markets of the gas pipe line companies. Eight sections contain 5,120 acres. The charge may be made that the assumption on which this argument is based is absurd. This may be true, but the absurdity of the assumption results directly from the absurdity of the orders of the Commission which make it possible for such a condition to exist. Appellants say the order of the Commission is sound. It would follow, therefore, that production of the entire gas pipe line requirements from 5,120 acres would likewise be sound, because the Commission's orders would permit this very thing. If these orders were upheld there would doubtless be many owners who would not be able to resist the temptation to drill many wells on small tracts in order to take advantage of the situation and produce gas greatly in excess of the quantity underlying their leases.

We submit that the orders are directly in the teeth of the holding of the Texas Supreme Court in *Brown* v. *Humble Oil & Ref. Co., supra.* For the convenience of the Court we again quote from that opinion:

"Conditions may arise where it would be proper,

right and just to grant exceptions to the rule, so as to permit wells to be drilled on smaller tracts than prescribed therein. Also, conditions may arise where it would be proper, right and just to permit tracts to be subdivided and such subdivisions drilled after the adoption of the rule; *but in all such instances, it is the duty of the Commission to adjust the allowable, based upon the potential production, so as to give to the owner of such smaller tract only his just proportion of the oil and gas.* By this method each person will be entitled to recover a quantity of oil and gas substantially equivalent in amount to the recoverable oil and gas under his land."

We do not believe the above decision can be applied to proration otherwise than to the effect that where production is restricted the Commission must determine allowable production from the property of each owner so as to enable him ultimately to recover *"a quantity of oil and gas substantially equivalent in amount to the recoverable oil and gas under his land."* This result may be obtained in some cases by considering acreage alone. If wells are evenly spaced over the entire reservoir it might be accomplished by considering the producing ability of the wells alone. It is necessary for the Commission in the case of the West Panhandle field to consider, also, rock pressure, porosity, permeability, and position on structure. The ultimate question before the Commission in all cases is to determine a formula that will give to each owner "a quantity of oil and gas substantially equivalent in amount to the recoverable oil and gas under his land". So long as the Commission approximates this result its orders are valid and reasonable, if any limitation be necessary and proper; but whenever the Commission fails to do so, then its orders become unreasonable, arbitrary and void even if proper restriction were justified. It does not matter very much what the Commission considers or what it does not consider, so long as the result is correct. The result is not correct in the

Panhandle field. We think we have shown this beyond any question. Certainly the orders with respect to gas proration in the Panhandle field do not entitle a person *"to recover a quantity of oil and gas substantially equivalent in amount to the recoverable oil and gas under his land."*

The situation in the Panhandle field presents a much stronger case than was presented to the Supreme Court in the Brown case. A reading of House Bill 266 convinces us that the Legislature had in mind a proration formula that would permit each owner in a common pool to "recover a quantity of oil and gas substantially equivalent to the amount of recoverable oil and gas under his land". If the Legislature had not intended just this result, then it would not have required the Commission to consider acreage; it would not have required a consideration of rock pressure; it would not have required a consideration of permeability; it would not have required a consideration of the position of the well upon the structure. *These are the factors that must always be considered in determining the quantity or volume of gas in place under any given lease.* It is true that the Legislature also requires the Commission to consider the open flow of each well, but it also enjoins upon the Commission the duty to give such factor only its reasonable weight. The Act cannot be construed so as to permit the Commission to give an arbitrary weight of 100 per cent to open flow in distributing one-half the total allowable.

We respectfully submit that the act in question, when considered in its entirety and when considered in relation to the historical background of this entire problem, contemplates clearly that the Commission should so prorate gas production as to guarantee, as nearly as possible, to each person the right to produce a quantity of gas *"substantially equivalent in amount to the recoverable * * * gas under his land."*

The statute clearly contemplates that the *whole allowable* will be fixed by a formula that will give due weight to acreage (up to the efficient drainage area) and daily capacity or potential. It is not permissible to consider acreage alone on a part of the allowable and potential capacity on the remainder.

Our discussion thus far has been confined to the theory of appellants that the orders would protect correlative rights of all the owners. Appellants say also, although the evidence is clearly to the contrary, that the orders are valid as measures to prevent underground waste. But under the latter theory the orders must pass the test laid down in *Brown* v. *Humble, supra.* Indeed, Rule 37, regulating the spacing of wells, was upheld in that case as a waste prevention measure. The orders under attack are arbitrary and unreasonable whether treated as regulations to prevent waste or to protect vested rights. They do neither. If it were necessary and permissible to restrict production for either purpose, the orders must not transcend public necessity. It is possible to restrict production without taking gas from some owners and giving it to others. It, therefore, must be restricted, if at all, in the light of that possibility.

Beginning on page 232 of their brief, appellants undertake to justify allowing the 211 sour gas wells, which, as we have seen, are producing from only 33,750 acres of the 270,000 acres in the sour gas area (R. 177), to produce 520,496,000 cubic feet daily, under the order of December 18th (R. 498), while the sweet gas wells in the West Panhandle field, numbering 293, located on 523,063.97 acres, belonging to the pipe lines, and 180 wells located on 30,096 acres belonging to other owners are allowed to produce only 608,552,000 cubic feet daily. Appellees do not attack that portion of the order allowing the owners of sour gas wells to produce the full amount of their market outlet.

There is no ground for misunderstanding the position of appellees on this point. The point we make is that since the owners of these sour gas wells are allowed to produce practically as much gas as the combined requirements of the pipe lines for sweet gas in the Panhandle field, *appellees and others similarly situated should not be denied the right to protect themselves against the inevitable drainage to the sour gas area resulting from this disproportionate taking.* In other words, we are not trying to prevent the owners of the sour gas wells from taking their requirements; but we challenge the validity of any order which forces appellees to submit to these great losses by drainage to the extent that we are able to produce and market our gas in our own private markets.

Appellants assert that appellees are not entitled to be heard on this point because it is neither alleged nor shown that appellees directed such inequalities to the attention of the Commission, and did not allege that such administrative body would not give appellees a fair hearing on such claimed discriminations. Appellees did not so allege; but it is clear from the record that the Commission would not have given them any relief against such discriminations. The hearings on the applications for interlocutory injunctions were held some time prior to October 7, 1935, on which date the trial court handed down its opinion granting interlocutory injunctions. The opinion shows that a full hearing was had on the applications (R. 131-140). Notwithstanding the fact that in appellees' pleadings, in the hearing on applications for interlocutory injunctions, and in the opinion of the court, the Commission's attention was called to these inequities and the contentions of appellees thereon, the Commission, more than sixty days after the opinion was handed down, issued the orders of December 10th and December 18th, which were in their practical

operation and effect substantially to the same purport as the orders effective at the time the bills were filed.

But it was neither necessary nor proper for appellees to apply for a rehearing. The statutes providing for a judicial review of the orders of the Commission pertaining to the production of oil and gas contain no provision for the granting of a rehearing and, under the decisions of the Texas appellate courts, the Commission is without jurisdiction to entertain a motion for rehearing. The concluding portion of the order, under which the Commission sought to retain jurisdiction for the purpose of correcting inequalities, was doubtless designed to avoid the necessity of issuing new notices in the event of additional hearings. That such provision is void is manifest from the Texas decisions. The Commission could not change its orders except after formal notice to those interested. *Railroad Commission* v. *Houston Chamber of Commerce,* 78 S. W. (2) 591; *Sun Oil Co.* v. *Gillespie,* 85 S. W. (2) 652. Upon the promulgation of the orders appellees were immediately at liberty, without attempting to procure the Commission to change its orders, to institute their proceedings for relief on the ground that the orders, in their practical operation and effect, were invalid because in violation of the Fourteenth Amendment and other provisions of the Constitution. *Prendergast* v. *New York Telephone Co.,* 262 U. S. 43, 67 L. E. 853; *Oklahoma Natural Gas Co.* v. *Russell,* 261 U. S. 290, 67 L. E. 659; *Pacific Tel. & Tel. Co.* v. *Kuykendall,* 265 U. S. 196, 68 L. E. 975; *United States* v. *Abilene & Southern Ry. Co.,* 265 U. S. 274, 68 L. E. 1017; *Banton* v. *Belt Line,* 268 U. S. 413, 69 L. E. 1020; *Columbia Ry. Co.* v. *Blease,* 42 Fed. (2) 463; *Canadian River Gas. Co.,* 4 Fed. Sup. 222. Under these authorities it is settled that appellees were not required to submit themselves to the jurisdiction of the Commission before applying to the courts for relief.

Appellees also exercised their right to invoke the jurisdiction of the courts by applying for relief in the District Court of the United States for the Western District of Texas, in which District Travis County, the County in which the venue of these appeals is fixed by the Texas statutes, is located. They invoked both the statutory authority of the court to review the orders and also the general equity jurisdiction of the court to pass upon the questions of constitutional law presented.

Another reason why appellees could not invoke the jurisdiction of the Commission by applying for a change in these orders is that by so doing they would have admitted the authority of the Commission to issue some kind of order restricting production below the market requirements of appellees. In the case of *Brown* v. *Humble Oil & Ref. Co., supra,* the jurisdiction of the Commission was not an issue. The question there involved was the validity of an order issued by the Commission in dealing with a subject of which the Commission unquestionably had jurisdiction. It did not deal with a motion for rehearing, but was considering the point that one adversely affected by a spacing order was entitled as a matter of right, and not as a mere matter of grace, to present his application for the granting of an exception to the rule. The Supreme Court held in *Sun Oil Co.* v. *Gillespie, supra,* that even in a proceeding involving a spacing rule, the Commission had no power to reconsider the matter on motion for rehearing, but that it could act only by giving new notices and making a new determination of the issue. Appellees are here attacking the statute and orders on the ground that the Commission is without authority to issue any order restricting production for the reason that the orders have no reasonable relation to the prevention of waste or the protection of the rights of the parties. The case of *Peterson* v. *Bryan,* from the opinion in which appellants quote on page 237 of

their brief, is easily distinguishable from the present case. There the regulations were promulgated under legislative authority; here we directly challenge the Commission's authority to issue any character of order restricting production.

Had appellants gone to the Commission and complained of the orders, they would doubtless have been turned down and would then have had to resort to the courts for relief. It goes without saying that had appellees taken that course, appellants would be here now contending that, having invoked the jurisdiction of the Commission and admitting the authority of the Commission to issue some kind of order, we could not be heard to challenge its authority under the statute to issue some character of order restricting the production from appellees' wells.

IV.

The Statute, as Interpreted by Appellants, Purports to Delegate Legislative and Judicial Functions to an Administrative Body, in Violation of the Provisions of the Texas Constitution Pleaded.

V.

The Statute Is So Vague and Indefinite in the Particulars Pleaded as to Render It Unreasonable and Arbitrary, and, Therefore, Invalid, Under the Due Process Clause.

The two points above stated are briefed together for the reason that they involve the same indefinite and uncertain terms contained in House Bill 266. Article II, Section 1, of the Texas Constitution divides the powers of government into three distinct departments, the legislative,

executive and judicial; and prohibits any person or group of persons of one of those departments from exercising functions properly attached to either of the others, unless expressly authorized by some provision. The Act, as interpreted by appellants, contains terms and expressions that require the Commission to exercise both legislative and judicial functions. These expressions are so vague and indefinite as that they constitute no standard to guide the Commission in the issuance of administrative regulations. They are so vague that men of common intelligence must necessarily guess and speculate as to their meaning. There is no provision in the Constitution of Texas whereby the Railroad Commission, an executive board, and the members thereof, who are executive officers of the State, may exercise any character of judicial or legislative function. This was expressly pleaded by appellees (R. 31, 95). Appellants have not challenged that allegation.

The specific provisions of the statute attacked by appellees in their pleadings, based on these grounds, are the provisions directing the Commission to ascertain the "reasonable market demand" for gas; that directing the Commission to allocate, distribute and apportion the allowable production from the common source of supply among the various producers on a "reasonable basis"; that directing the Commission to prorate and regulate the production of natural gas from each common reservoir "for the protection of public and private interests", and "to adjust the correlative rights and opportunities of each owner of gas in a common reservoir to produce, use or sell such gas as is permitted to be produced under the terms of the Act"; and the provision which, by indirection, seeks to confer upon the Commission the right to fix prices (R. 31-37, 95-101). The orders, of course, are attacked on the ground that they are likewise invalid because promulgated on assumed authority delegated under the provisions above referred to.

We have already presented the decisions of the Texas courts defining the correlative rights and opportunities of those owning lands in a common oil and gas reservoir. Our position is that the statute does not operate to redefine or change these correlative rights and opportunities, but that the statute must be read and construed in the light of the law as it existed as of the time the statute was enacted. We contend further that the Commission in its orders does undertake to change and modify the established rule of property. Appellants contend that the orders do not change or modify the established rule. If, as held in *Brown* v. *Humble Oil & Ref. Co., supra,* the rule in Texas gives the landowner the right to produce all the oil and gas that will flow out of a well on his land, and this is a property right limited only by the physical possibility of the adjoining land owner's diminishing the oil and gas under the first owner's land by the exercise of the same right of capture, then how can it be said with reason that an order of the Commission which denies him that right and restricts the production of gas from a land owner's well to a quantity far below the producer's needs, does not operate to change that rule of property? The right of the owner to produce and to use his gas, uniformly recognized by the courts prior to the enactment of this Act, can no longer be exercised by the land owner under the operation of these orders. It must be, therefore, that either the statute or the orders purport to effect a fundamental change in the nature and extent of this property right. Does the statute purport to change it? If not, the orders must have that effect.

The trial court found and held that the statute does not purport to create any new rule of property or to redefine the correlative rights of owners within a common source of supply as they have long been declared and defined (R. 158, 185). Several times in their brief appellants concede

that the statute did not change the existing rights of the land owner; but they assert that, notwithstanding the fact that the statute effects no such change, it does authorize and direct the Commission to issue orders, the inevitable effect of which is fundamentally and radically to change the existing rights. This is tantamount to saying that, while the Legislature in the statute did not change, modify or redefine the correlative rights of owners, it conferred upon the Commission the authority to do so.

Appellants proceed upon the theory, wholly discredited by the record as heretofore pointed out, that the orders allocate to each owner his fair share of the production. What is his "fair share"? No such expression is used in the statute. The statute, as appellants construe it, purports to authorize the Commission to limit the production "in the adjustment of the correlative rights and opportunities of each owner to produce and use or sell such gas"; but the term "correlative rights and opportunities" is not defined in the statute and no standard is prescribed through which the Commission can arrive at each owner's fair share of the production. Appellants concede, beginning at page 145 of their brief, that the statute cannot be construed as vesting in the Commission the power to ascertain and partition these rights. How could the Commission possibly ascertain each owner's fair share and promulgate orders that would limit each owner to his fair share without, in effect, ascertaining and partitioning his rights in the common reservoir? Must the Commission, in determining the fair share of each owner, take into account all the gas in the common pool that belongs to such owner? Appellants do not so construe the statute; for in their orders they ignore all the gas owned by appellees except that which underlies the tracts on which their wells are situated. Not all of this is considered; for these tracts are limited to 640 acres in the West field and 160 acres in the East field.

Such a distribution is wholly at variance with the established law as announced in *Brown* v. *Humble Oil & Ref. Co., supra.* All agree that the statute effects no change in the established law. Then, under the contentions of appellants, there is no alternative but that the statute operates to delegate to the Commission the power and authority to redefine correlative rights and establish a character of right entirely different from that recognized at the time the statute was enacted. This purported authority not only would permit the Commission to redefine these correlative rights, which is a legislative function, but it would confer upon the Commission the judicial power to partition the gas within the common reservoir among the common owners "on a reasonable basis."

What is meant by the expression "reasonable basis"? Does it mean a basis that will permit each owner ultimately to recover substantially the quantity of gas he owns in place? If so, the Commission has ignored the definition. If not, the statute operates to confer upon the Commission the power to exercise its own judgment as to what is a reasonable basis and to so limit the production from a well on a 640 acre tract as that the owner of a well on an adjoining 10 acre tract will produce not only his own gas, but a substantial portion of his neighbor's gas drained from the 640 acre lease.

What is the meaning of the word "market" in the expression "reasonable market demand"? Does it mean the aggregate of the desires of those who are offering to buy gas in the field? If so, the Commission has ignored the statutory mandate; for it has not ascertained the local markets in the field for natural gas, which the trial court on uncontradicted evidence found to be infinitesimal, but has ascertained the aggregate of the private sales of gas by appellee Texoma in Chicago and other distant points, of appellee Consolidated in the cities of Enid, Oklahoma, and

Hutchinson and Wichita, Kansas, those of the other pipe lines in Minneapolis and St. Paul in the State of Minnesota, in cities and towns in Southern Illinois and Indiana, in Kansas City, in Denver, and in some of the cities in Central Texas, as well as numerous other places remotely situated with reference to the Panhandle of Texas.

Can these private marketing contracts be rightfully termed "markets" within the meaning of the statute? None except the contracting parties has any rights in these contracts. A market contemplates a person who has a commodity which he is offering to sell and one or more persons who are offering to buy. The purchasers under the private contracts of the various pipe lines are not offering to purchase gas from any owner who may have gas to sell, for they have obligated themselves under firm contracts to purchase their gas from the pipe lines with which they have contracted.

We point out that there is no such thing as a market for natural gas in the ordinary sense in which that term is used. This is true because of the circumstance that gas must be delivered in one continuous movement from the well to the ultimate consumer, and that it cannot be stored and kept for the supplying of future demands as can oil, wheat, cotton or any other ordinary commercial commodity. If there is no demand for the ordinary commodity at a given time, there are those who are willing to anticipate a future demand and who will buy it at a price and speculate on the value of the commodity when a demand arises. There are always those who are willing to buy oil, cotton, wheat and other staple commodities and store them with a view of offering them for sale at a later date. This cannot be done in the case of natural gas. The result is that in every instance where there is found a market for natural gas, that market is a private contract between the seller and the purchaser, which, as found by

the trial court, constitutes very valuable property of the seller. We have already pointed out that in order to procure contracts for the sale of gas and to finance pipe lines to transport the gas to the point of delivery, appellees and those similarly situated were required to invest millions of dollars in the purchase and development of their own gas reserves. The very nature of the gas business makes this essential. As the court recognized in *Wichita Gas Co.* v. *Public Service Commission,* 2 Fed. Sup. 792:

> "The first duty of the company is to see to it that its patrons have an adequate supply of gas. To insure this, it must own the gas. Contracts for gas are well enough when gas is plentiful, but when the shortage comes, contracts are not adequate safeguards. Broken contracts will support verdicts for damages, but they will not heat the houses nor cook the breakfasts of the patrons in Kansas. The company has not only the right, but is under the duty, to own enough gas to meet the needs of its customers."

Since appellees are under this duty and have made the heavy investments incident to the performance of that duty, and are now in position from their own wells to supply their customers with all the gas they need at any time they need it, can it be said with reason that the Legislature of Texas intended by the expression "reasonable market demand" to require the Commission to make a partition and distribution of the rights of the different pipe line companies under their private contracts for the delivery and purchase of natural gas? If not, what does the expression mean? Was it intended by the Legislature that the Commission should go to the State of Wisconsin, to the State of Michigan, to the City of St. Louis, and to other undeveloped potential markets for the sale of natural gas, and take into account the possibilities in those undeveloped areas? The question cannot be answered by a reading of the statute. Men can but guess at what the Legislature meant by the term "reasonable market demand." There-

fore, under appellants' construction of the statute, the Legislature must have delegated to the Commission the power and authority to determine what was meant by the term "reasonable market demand" and to proceed in its own way to ascertain it.

Section 20 of the Act provides that in the event the Commission finds that the owner of a well has failed or refused to utilize or sell the allowable production when he has been offered a market at a reasonable price, such well shall be excluded from consideration in allocating the daily allowable production from the reservoir or zone in which same is located until the owner thereof shall signify to the Commission his desire to utilize or sell such gas. What is meant by the term "reasonable price"? Can it be said that that term has a definite and well defined meaning such as is required of a legislative standard for the guidance of administrative bodies? Is it intended by this to vest in the Railroad Commission the authority, by direction, to fix prices? The ascertainment of "reasonable price," like the ascertainment of "fair share" of the allowable production, cannot be determined by the Commission without exercising functions which are exclusively judicial. In its opinion upholding the position of appellees on this point, the trial court cited *Board of Water Engineers* v. *McKnight*, 111 Tex. 82, 229 S. W. 301. The point that the statute, as construed by appellants, undertakes to delegate to the Commission judicial and legislative functions is exactly the same in principle as the point considered by the Supreme Court of Texas in that case, in which the court held that a statute requiring the Board of Water Engineers to determine the rights of claimants to waters of any stream was an unconstitutional delegation of judicial power. Appellants say they have no quarrel with the decision in that case, but seek to distinguish it by the observation that the court there held that the order of the administrative board

had the force of a judgment relating to the appropriation of water. The order in that case was no more a judgment than the order in this case, under which the Commission undertook to adjudicate the rights of owners of a gas field and allocate to each his "fair share" of the quantity which the Commission determines to be the reasonable market demand. The *McKnight* case is a leading case in Texas on this point; and we invite a careful consideration of the holding in that case of the Supreme Court of Texas, by whose construction of a provision of the Texas statutes this Court will doubtless hold itself to be bound. In passing, we may observe that the Act involved in the *McKnight* case required the Board to make a determination of "relative" rights. The statute under attack here differs on this point only in that it requires the Commission to make a determination of "correlative" rights. There can be no distinction between "relative rights" and "correlative rights" as applied to the owners of natural gas in the common reservoir. We quote briefly from the opinion:

> "From what has been stated it clearly appears that the precise question to be decided is whether the Legislature could confer on persons in the executive department power to determine and adjudicate the rights and priorities of water rights in the face of constitutional provision against the exercise by the officers of the executive department of any power properly attached to the judicial department, except in the instances expressly permitted. * * * Here we have statutes under which, if held valid, the water rights of the citizens could be either forfeited or *transferred to another*, without any pretense of court action."

These orders, if authorized by the statute as contended by appellants, inevitably operate, as we have already demonstrated, to transfer the property of appellees to other owners. This circumstance makes the comment of the Supreme Court of Texas just quoted very pertinent.

Appellants cite *Motl* v. *Boyd*, 116 Tex. 82, 286 S. W. 458,

and *Trimmier* v. *Carlton*, 116 Tex. 572, 296 S. W. 1070, and undertake to show that these cases hold to the contrary of the holding in the McKnight case. Two members of the court which decided the McKnight case (including the author of the opinion in that case) were members of the court at the time the *Motl* and *Trimmier* cases were decided. Manifestly, it was not intended by the court in the latter cases to overrule the decision in the first case, for the opinion in the *McKnight* case was not even criticised in the latter opinions. The distinction between the *McKnight* case and the other two cases is apparent at once. The *McKnight* case had to do with vested property rights of riparian owners in the normal flow of waters along a stream. The *Motl* case related wholly to public waters, flood waters belonging to the State, as distinguished from the normal flow of waters. This distinction was pointed out by the court in the *Motl* case. We have already pointed out that the Legislature is practically without limitation in its power to delegate to administrative officers the right to deal with property belonging to the State in its proprietary capacity. No such power rests in the Legislature, however, in dealing in a governmental capacity with private property rights.

The *Trimmier* case related to the validity of a statute passed under specific authority of the constitution, authorizing the organization of conservation and reclamation districts. The law was sustained on the ground that it was in principle of the same character as laws authorizing the organization of school districts, levee districts, road districts, and other municipal or quasi-municipal corporations organized for the common good.

The distinction between the *McKnight* case and the present case, on the one hand, and the *Motl* and *Trimmier* cases, on the other hand, is illustrated in numerous other decisions, including *Shupee* v. *Railroad Commission*, 73

S. W. (2) 505; *Weatherly* v. *Jackson*, 133 Tex. 213, 71 S. W. (2) 259; *United States* v. *Grimaud*, 220 U. S. 506, 55 L. E. 563; and *Raymond* v. *Kibbe*, 95 S. W. 727.

In the *Grimaud* case this Court pointed out that the lands involved belonged to the United States, and Congress had a right to authorize the issuance of licenses to graze the land under such terms as it saw fit. In the *Raymond* case it was pointed out that the State was the owner of fish in its public waters and could impose such conditions as it might choose on the taking and appropriating of these fish. The other two cases have to do with limitations on the use of public roads for hire, in which it was correctly held that the State, as the owner of public roads, has a right to prescribe limitations upon their use for hire.

In their brief appellants assert that the opinion in *Dockery* v. *State*, 93 Tex. Cr. Rep. 220, 247 S. W. 508, cited by the trial court, is in conflict with *United States* v. *Grimaud*. In construing a provision of the Texas constitution, this Court, under the general rule, would follow the opinion of the Court of Criminal Appeals, which is the court of last resort in criminal matters, even if that opinion were in conflict with the *Grimaud* case; but the opinion is not in conflict with that of this Court in the *Grimaud* case. The holding in the *Dockery* case was that a delegation to the State fire marshal of authority to promulgate minimum specifications for the construction and erection of each type of fire escapes was an unlawful delegation of legislative power under the provision of the Texas constitution here under consideration. This holding, of course, is directly contrary to the contentions of appellants. The distinction between the two cases is aptly expressed in the observation that the *Grimaud* case had to do with the regulation of property owned by the sovereign in its proprietary capacity, while the regulation in the *Dockery* case

had to do with the use by a citizen of his private property, as do the regulations now under consideration.

Appellants would take the trial court to task for citing *City of San Antonio* v. *Zogheib*, 70 S. W. (2) 333, and in this connection state that the opinion in that case is in conflict with *City of San Antonio* v. *Thompson*, 23 S. W. (2) 796; *City of San Antonio* v. *Humble Oil & Ref. Co.*, 27 S. W. (2) 868; and *City of San Antonio* v. *Rubin*, 42 Fed. (2) 107, all of which related to the same ordinance; and further state that the opinion in the *Zogheib* case is not authority for the reason that a writ of error has been granted by the Supreme Court in that case. It is true that a writ of error was granted by the Texas Supreme Court in the *Zogheib* case, and in this connection it is interesting to note that in granting the writ the court made the following notation:

> "While we are inclined to the view that the ordinance is void, we grant the writ on the conflicts alleged."

The Texas Syllabi, in the issue of June 13, 1934, reports that the ground of jurisdiction alleged in the application was:

> "The Court of Civil Appeals for the 11th Supreme Judicial District has held differently from holdings made by the Court of Civil Appeals for the 4th Supreme Judicial District upon a question of law and the holdings by each court are plainly upon questions of law. Both courts had before them the same ordinance."

Manifestly, the cases in conflict with the *Zogheib* case were the *Thompson* and *Humble* cases, on which appellants rely. The only indication we have of the views of the Supreme Court, therefore, is the notation that it was inclined to the view that the ordinance was void.

A writ of error was granted by the Supreme Court in the *Thompson* and *Humble* cases also on grounds of conflict

of opinions. Both were dismissed by agreement before they were reached by the Supreme Court. The latter court has not passed on the *Zogheib* case, but the opinion in that case and the notation of the Supreme Court above referred to constitute the last expression from any Texas court on the point in connection with which the trial court cited the *Zogheib* opinion.

The opinion of the Circuit Court of Appeals in the *Rubin* case, although involving the same ordinance as that involved in the *Zogheib* case, involved no attack upon the ordinance on the ground that it was void because in violation of the Texas constitution.

In apportioning the gas among the different owners on a reasonable basis, how much consideration, under Section 13, shall be given to the different elements which under the statute the Commission must take into account, namely, the size of the tract, the daily producing capacity of the well, the surface position on the structure of the tract on which the wells are situated, and all other factors which are pertinent? How much weight will be given to the productive capacity, the formation pressure, permeability and porosity of the producing formation and the structurel position of the well, in arriving at the drainage area for a gas well? Must the Commission allocate to wells on larger tracts an allowable that will enable the owner to recover substantially what he owns in place, or may the Commission increase the allowable to smaller tracts in order to offset the comparative cost of development, or for some other reason, as the Commission manifestly did in the orders under attack.

What are the "public and private interests" which the Commission is directed to protect? Is it the private interest of each producer entitling him to produce ultimately the gas which he owns in place? If so, the orders do not meet the test.

In Section 20 the statute provides that in the event the Commission finds that the owner of a well has failed or refused to utilize or sell the allowable production when he is offered a market at a reasonable price, the well shall be excluded from consideration in allocating future daily allowable production until such time as he signifies his desire to utilize or sell his gas. What is a "reasonable price"? When and why will the Commission be authorized under the law to hold a certain price to be reasonable? No standard for arriving at a reasonable price is prescribed in the Act. Must the price be reasonable from the standpoint of the producer in order to permit him to sell his gas at a profit, or must it be reasonable from the standpoint of the purchaser to enable the latter to rehandle the gas or use it at a profit? This is just another example of the vague and indefinite terms of the statute.

We respectfully submit that, in so far as the Legislature purported to delegate to the Commission power to determine the meaning of the expressions "correlative rights and opportunities," "reasonable market demand," "reasonable basis" and "reasonable price," there was a delegation of powers prohibited by the Texas constitution.

Not only is the statute invalid because in violation of the provisions of the Texas constitution; but it is likewise invalid under the test of the Fourteenth Amendment. Without repeating the various vague and indefinite terms above pointed out and the discussion showing the utter impossibility from the standpoint of men of common intelligence to comprehend and understand the application of the statute in which these terms are used, we point out that it has been frequently held that statutes of this character are arbitrary and unreasonable and operate to take the property of those adversely affected without due process of law.

In *Connally* v. *General Construction Co.*, 269 U. S. 385, 70 L. E. 322, this Court, in considering a statute which required contractors doing work to pay not less than "the current rate of wages in the locality," held the statute void because of the vagueness and uncertainty of the terms "locality" and "current rate." In discussing the point the court said:

> "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

Continuing, the court said:

> "In the first place, the words 'current rate of wages' do not denote a specific or definite sum by minimum, maximum and intermediate amounts indeterminately, varying from time to time, and dependent upon the class and kind of work done, the efficiency of the workman, etc., as the bill alleges is the case in respect to the territory surrounding the bridges under construction. The statutory phrase reasonably cannot be confined to any of these amounts, since it imports each and all of them. The 'current rate of wages' is not simple but progressive—from so much (minimum) to so much (maximum), including all between; and to direct the payment of an amount which shall not be less than one of several different amounts without saying which, is to leave the question of what is meant incapable of any definite answer. Nor can the question be solved by resort to the established canons of construction that enable the court to look through awkward or clumsy expression, or language wanting in precision, to the intent of the Legislature. For the vice of the statute here lies in the impossibility of ascertaining, by any reasonable test, that the Legislature meant one thing rather than another, and in the futility of an attempt to apply a requirement which assumes the existence of a rate of wages single in amount, to a rate in fact composed of a multitude of gradations. To construe the phrase 'current rate of wages' as meaning either the lowest rate or the highest rate, or any intermediate rate, or, if it were possible to determine the various

factors to be considered, an average of all the rates, would be as likely to defeat the purpose of the Legislature as to promote it."

This case is decisive of the case at bar on this question. There is no legal difference in the expressions "correlative rights and opportunities," "reasonable market demand," "reasonable basis," and "reasonable price" and the expression "current rate of wages." "Current rate of wages" is just another way of saying "market price of labor." Applying the reasoning of this Court in that case, must it not be said in this case that "reasonable market demand" embraces market demand varying from day to day at the highest possible price level as well as the lowest and all intermediate prices, and does not say which or where or when; and that to strike an average (if such a thing were possible) would as likely defeat the purpose of the Legislature as promote it. The same observation may be made reference to the expressions "reasonable basis," "reasonable price" and "correlative rights and opportunities."

In *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, 65 L. E. 516, this Court struck down a statute which imposed a penalty on anyone who should make "any unjust or unreasonable rate of charge in handling or dealing in or with any necessaries" on the ground that same was void for vagueness and uncertainty.

In *Gulf Refining Co.* v. *City of Dallas*, 10 S. W. (2) 151, the court held that an ordinance authorizing the building inspector to deny an application for the construction of a building where he deemed the granting thereof would injure property or be hurtful to the residents of the district, without defining the degree of hurt, injury or inconvenience, was invalid for indefiniteness.

On both these points the case of *Spann* v. *City of Dallas*,

111 Tex. 350, 235 S. W. 513, is a leading case in Texas. In that case the Supreme Court of Texas said:

> "No rule or standard is given to govern the applicant in furnishing the design of his building, or to govern the inspector in approving or rejecting it. The ordinance leaves to the unbridled discretion of the inspector to disapprove the design, resulting in the refusal of the permit and the prohibition of the building. This leaves the right to construct the building subject to the arbitrary discretion of the inspector and of itself renders it automatically void. *The very essence of the American Constitution is that the material rights of no man shall be subject to the mere will of another.*"

Conclusion.

We submit the statute and orders under attack, as applied to appellees and to the physical conditions in the Texas Panhandle, have no reasonable relation to the prevention of gas wastage, underground or overground, or to the protection of the correlative rights of those who own interests in that gas reservoir; that neither the statute as construed by appellants nor the orders were intended to prevent waste or to protect correlative rights; but that, under the guise of preventing waste and protecting correlative rights, they were enacted and promulgated for the illegal and prohibited purpose of coercing appellees and others similarly situated to divide their markets and their marketing facilities with the owners of other wells in the field; that the necessary operation and effect of the statute and orders is to serve not a public interest, but private interests, which would, without compensation, be permitted to avail themselves of the benefits and profits of those who have exercised the initiative and diligence and who have invested their money in the development of private marketing contracts and the construction of pipe lines and other transportation facilities; that the necessary operation and

effect of the orders also is to take, without compensation, enormous quantities of gas from appellees and others similarly situated which, but for the statute and orders, they would be able to produce and market before its escape by drainage to other wells.

For all the reasons assigned in this brief, the statute, as construed by appellants, and the orders purported to be promulgated under authority of the statute are invalid and unenforcible as against appellees and others similarly situated. The decrees of the trial court in striking down the orders and, by implication, the statute, as construed by appellants, reflect the substantial justice of the case and are sustained by the overwhelming testimony and by the authorities, including the decision of this Court, and should be in all things affirmed.

Respectfully submitted,

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Of Counsel.

ROCK PRES

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Continued

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ROBERTS

H E M P H I L L

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H. & T. C. R.R. Block 43

T. C. R.R. Block M-22

H. & T. C. R.R. Block A

H. & T. C. R.R. Block 46

GUNTER & MUNSON Block C

GUNTER & MUNSON Block 1

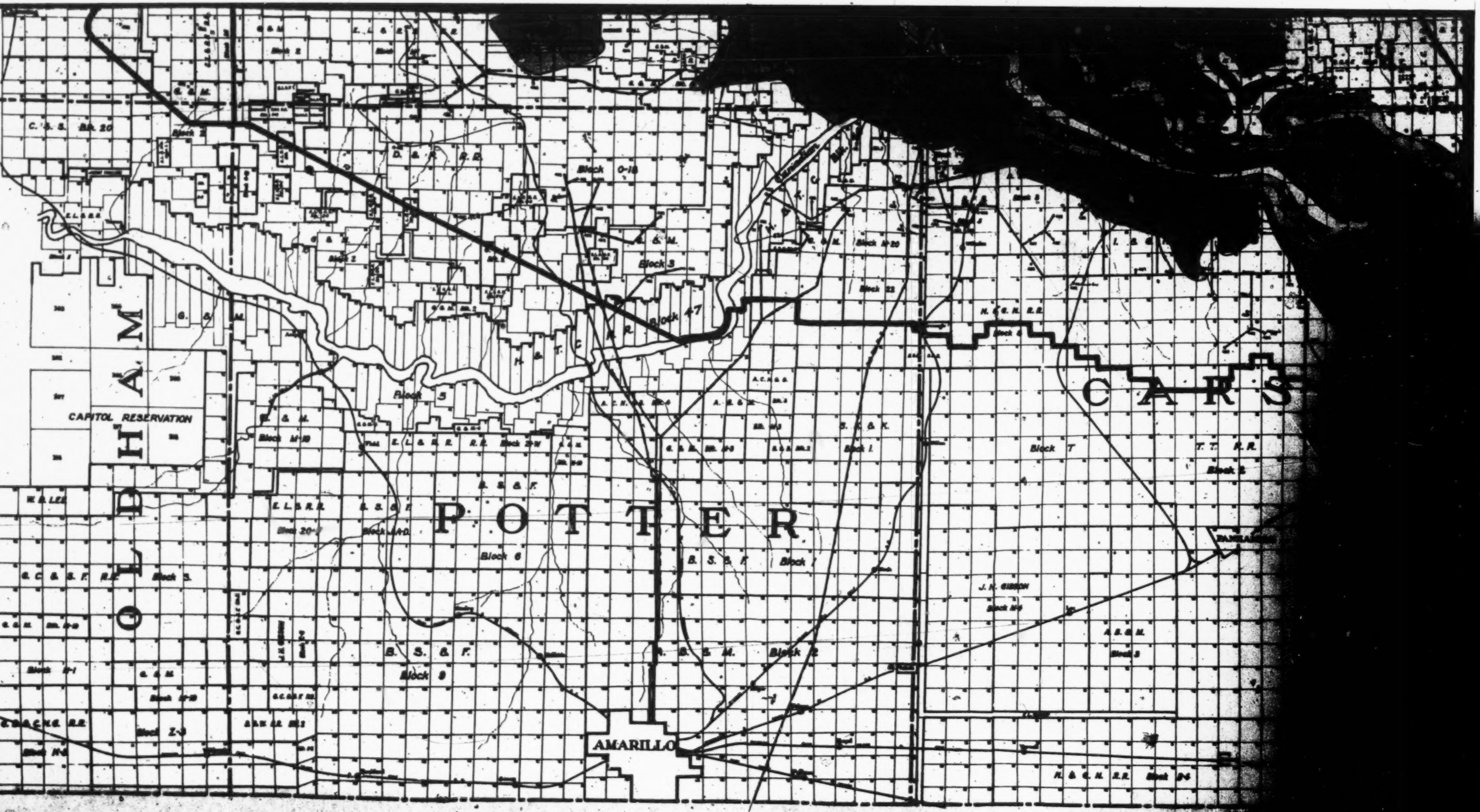
H. & G. N. R.R.

G. C. & S. F. R.R.

G. & M. Block C

L. & G. N. R.R. Block 2

CANADIAN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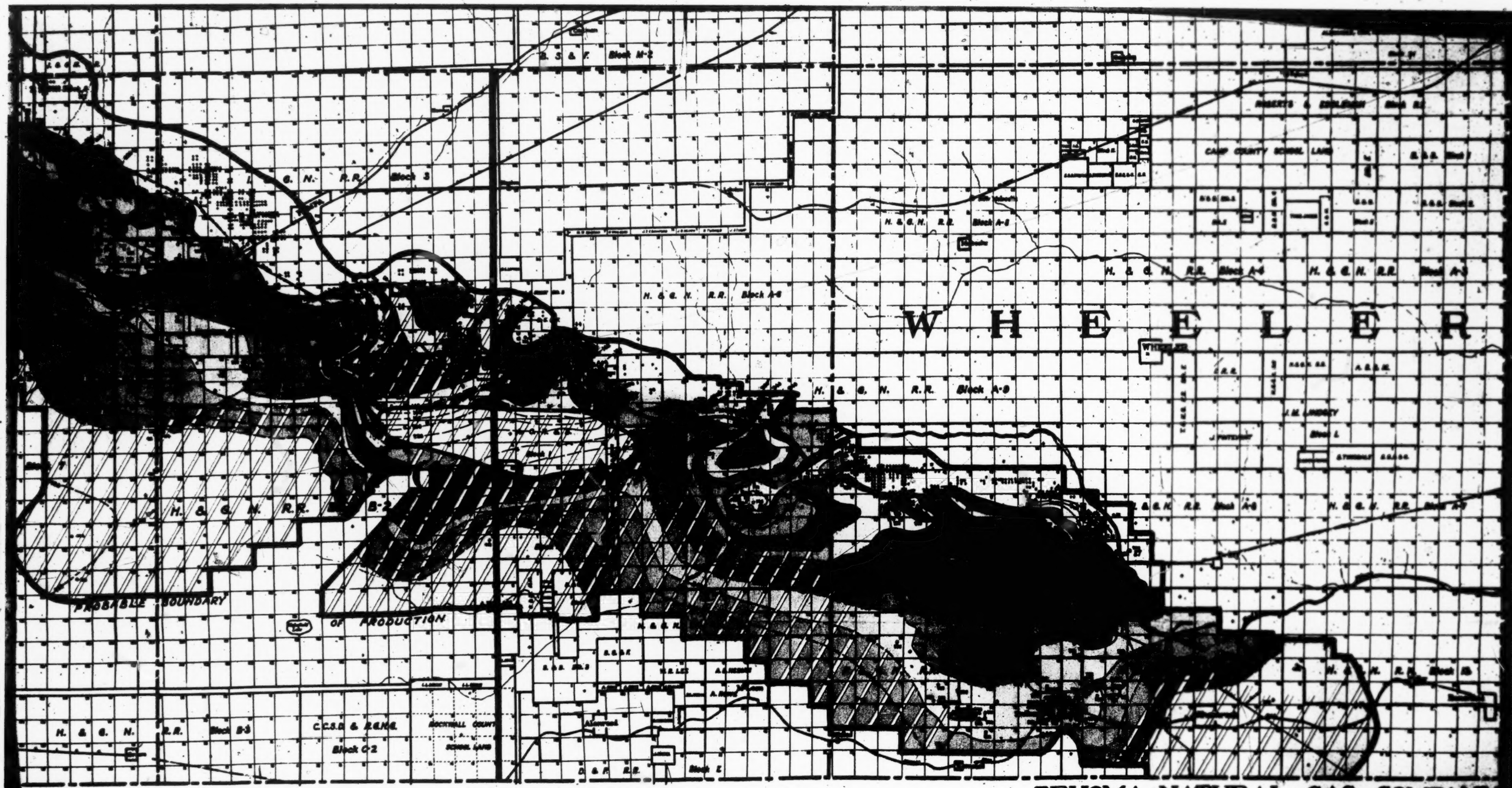
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H. & G. N. R.R. Block A-5
H. & G. N. R.R. Block A-3
H. & G. N. R.R. Block A-9
H. & G. N. R.R. Block B-2
H. & G. N. R.R. Block B-3
H. & G. N. R.R. Block 3
G.C.S.D. & S.F.R.R. Block C-2
D. & P. R.R. Block 2
CAMP COUNTY SCHOOL LAND
ROBERTS & DOUGLASS Block R-2
J. M. LINDSEY Block L
TEXOMA NATURAL GAS COMPANY
GEOLOGICAL DEPARTMENT